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No. 321

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court below (R. 194-200) is reported 278 F.2d 282, 107 U.S. App. D.C. 402. The Decision nd Order of the Board (R. 37-46) are reported at 123 LRB 1547.

JURISDICTION

The decision and order of the court below (R. 194,200) ere entered on April 18, 1960, and its decree (R. 201), on ay 18, 1960. On July 8, 1960, by order of Mr. Justice

Black, the time for filing the Petition for Writ of Certiorari herein was extended to August 16, 1960 (R. 205). The Petition for Writ of Certiorari was filed on August 12, 1960, and was granted on October 24, 1960 (R. 206). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Section 10 (e) and (f) of the National Labor Relations Act, as amended. (61 Stat. 146, 29 U.S.C. 160 (e) and (f))

STATUTES INVOLVED

This case is governed by the National Labor Relations Act, as amended, sometimes referred to herein as the Act, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 USC § 151 et seq., as it appeared prior to its 1959 amendment.

The relevant provisions of the Act are:

"Sec. 2. When used in this Act— * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment as authorized in section 8(a)(3).

"Sec. 8(b). It shall be unfair labor practice for a labor organization or its agents— * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; * * *

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

In 1959, the provisions of Section 8 (b)(4)(A) were amended (Public Law 86-257, 1959, Section 704 (a), 73 Stat.

541, 29 U.S.C. § 158), and now appear as follows insofar as pertinent to this case:

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents— * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing: * * *

"*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or

approved by a representative of such employees whom such employer is required to recognize under this Act: * * *"

QUESTION PRESENTED

Whether a striking union violated Section 8(b)(4)(A) of the Act by picketing with signs publicizing its dispute with the struck employer at a gate to that employer's manufacturing plant which he had reserved for the exclusive use of his independent contractors and their employees who were performing work on his plant premises which was beneficial to the struck employer.

STATEMENT OF THE CASE

A. The Facts

On August 4, 1958, General Electric Company, hereinafter sometimes called GE, filed a charge alleging that Petitioner violated Section 8 (b)(4)(A) of the Act by picketing Gate 3-A at its Appliance Park, Kentucky plant, where Petitioner was on strike (R. 1). On August 6, 1958, a complaint was issued by Respondent's Regional Director for the Ninth Region (R. 4). On September 22 and 23, 1958, a hearing was held before the Trial Examiner. The Board's decision was rendered on June 8, 1959. All statements of fact recited below were either found by the Board directly or were findings of the Trial Examiner adopted by the Board, or are uncontradicted on the record.[1]

Petitioner has been, at all times material, the collective bargaining agent for the production and maintenance employees at General Electric Company's Appliance Park, Kentucky installation (R. 38; 49). Appliance Park is com-

[1] References to the record preceding a semicolon are to the findings of the Board or the Trial Examiner; succeeding references are to supporting evidence.

posed of 13 buildings, located on a 1000 acre tract (R. 38; 51). Six of the 13 buildings are used directly for manufacturing and the other buildings augment this function (R. 14; 51). At the time of the events herein, there were approximately 10,500 people employed by GE in Appliance Park, about 7600 of whom were in the collective bargaining unit (R. 38; 61).

Appliance Park is located about 10 miles from Louisville, Kentucky and the overwhelming majority of the employees drive to work by private car (R. 38; 57). Access to Appliance Park by automobile can be achieved through any one of five gates (R. 38; 52). Once a car enters any of these gates, there is no impediment to movement between buildings (R. 64-65, 115).

One of the five gates to Appliance Park, all of which were picketed, is designated Gate 3-A (R. 38; 49). This gate had been assigned by General Electric in 1954 for the use of employees of independent contractors who do work for GE in Appliance Park (R. 39-40). GE asked the contractors to have their employees use Gate 3-A because it hoped that, in the event of a strike of the employees of any of the contractors, the union on strike would restrict picketing to this gate and not picket the other gates at Appliance Park (and thereby impede General Electric's employees from using the other gates) (R. 39; 66, 117, 179). A sign was placed over the gate which read (R. 40; 140, 170):

"Gate 3-A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES"

Instructions were given to plant guards to direct General Electric Company employees who might appear at Gate 3-A to use other gates.[2]

On July 27, 1958, employees represented by Petitioner instituted a lawful economic strike based on 24 unresolved grievances (R. 41; 49, 50).[3]

At the outset of the strike and through its entire course, i.e., from July 27, 1958 to August 10, 1958, GE made public solicitations to its employees to go through Petitioner's picket lines to work (R. 135). Approximately 2000 of the 7600 employees in Petitioner's bargaining unit did, in fact, go through the picket lines and perform work during the strike (R. 18, 41; 63, 117). In addition, some of the contractor's employees went through the picket line and performed work (R. 41; 75, 116).

The Company's counsel stated that "the Company indicated that the plant was open, that anyone who had business to perform or work to do at the plant was welcome at the plant." The Company sought not only to induce its employees to work during the strike but sought also "otherwise to transact the plant's business during the strike." (R. 137).

On the morning the strike started, pickets were stationed

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[2] The guards were employed and supervised by GE (R. 68-69, 165-166). GE production and maintenance employees were not informed that these instructions were given (R. 58-60). The Company did not offer to restrict Gate 3-A to contractors' employees during the strike nor did it take any steps to insure such restrictive use of the gate (R. 20; 134-136). There is evidence that several Company employees had used Gate 3-A for ingress and egress but the degree to which GE employees used this gate prior to the strike is not material to this proceeding (R. 146, 150, 152, 155).

[3] There is no issue in the proceeding as to the authorization or legality of the strike.

at all five gates leading to Appliance Park (R. 41; 49, 50). The pickets at all the gates carried similar signs which read (R. 41; 133-134):

"Local 761
ON STRIKE
GE UNFAIR"

Neither the signs, nor statements made by the pickets or Petitioner's representatives, indicated that the strike was directed against any employer other than GE. There is no evidence that Petitioner, or any of its representatives, approached the unions which represented the contractors' employees to solicit cooperation in causing a cessation of work at Appliance Park or at any other location. Contacts between Pefitioner and the contractors' employees occurred as the contractors' employees individually, or in one instance in a group of three, approached the gates of Appliance Park. In a few instances, contractors' employees and supervisors appeared on their own initiative at Petitioner's headquarters. (R. 41; 78, 79, 85, 87, 88, 97, 98).

The independent contractors were engaged to perform maintenance and construction work, in many instances identical to the work which GE employees could, and did, perform (R. 15-16; 56, 62, 84-85, 130, 147). The majority of the work done by the independent contractors' employees was performed in the manufacturing buildings where Petitioner's members normally work (R. 16; 62-63, 99, 111, 122, 128, 131-132). Some of the work to be done by the contractors was work for which estimates were received both from the GE maintenance division in Appliance Park and from outside contractors, and for which the outside contractors submitted a lower bid (R. 15; 124-125, 130). In one instance, the GE maintenance division had been given the assignment but lacked sufficient personnel

to complete the work, and an outside contractor was given the assignment (R. 15; 203-205).[4]

Most of the employees of the independent contractors declined to work at Appliance Park during the strike (R. 18, 41; 85-87). Some of them asked Petitioner for passes to go through the picket line to secure personal tools which had been left in the plant. Such passes were issued on request. (R. 18; 82-83, 97, 109-110). Many of the contractors' employees who did not cross the picket line at Appliance Park during the strike were dispatched by the contractors to other projects on which each contractor was then working (R. 78, 83). None was asked to refuse to perform work for his employer at any location other than at the General Electric Appliance Park plant.

Picketing at Gate 3-A was enjoined by decree of the Federal District Court on August 9, 1958, pursuant to Section 10 (l) of the Act, and was stopped on that date (R. 41; 134).

B. Trial Examiner's Findings and Conclusions

The Trial Examiner found that Appliance Park was not a "common situs" occupied by both GE and its contractors, and that GE does not "share its premises" with the contractors (R. 21-22). He found that Gate 3-A was merely an access to the site of the primary labor dispute, and consequently regardless of whether it was customarily used exclusively for the independent contractors and their employees, Petitioner had a right to picket the gate. He found further that the object of the picketing was to halt the operations of the struck plant by appeals directed collectively (a)

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[4] The subcontracting of work to the independent contractors was not a cause of or an issue in the strike.

to the Company's employees at gates 2, 3 4 and 5, (b) to the consuming public at all gates, (c) to secondary employees who were engaged in transporting raw materials and finished products and who used gates 3 and 4, and (d) to the contractors' employees at Gate 3-A. He found that there was no intent to induce or encourage the secondary employees to cease work at any place other than at Appliance Park. He concluded that appeals to secondary employees were "valid, primary activity with secondary effects" and that Petitioner had not violated Section 8 (b)(4)(A). (R. 35).

C. Board's Conclusions and Order

Without reversing the Trial Examiner's finding that there was no intent to induce or encourage the contractors' employees to cease work at any place other than at Appliance Park, the Board found that Petitioner's object in picketing Gate 3-A was "to enmesh these employees of the neutral employers in its dispute with" General Electric Company (R. 42). The Board concluded that Petitioner had "accordingly" violated Section 8 (b)(4)(A) and ordered that Petitioner cease and desist from such activity.

D. Decision of the Court Below

The court below granted enforcement of the Board's order and denied Petitioner's petition for review. The court held that the ultimate determination depended upon the objective of the Petitioner's activity at Gate 3-A. The court concluded that there was substantial evidence to support the conclusion that Petitioner's objective was to encourage the employees of the neutral employers to engage in concerted refusal to perform any services in the course of their own employment, and affirmed the Board's

conclusion that Petitioner's picketing at Gate 3-A violated Section 8 (b)(4). (R. 194-200).

SUMMARY OF ARGUMENT

I

The terms of the Act and the legislative history both show that Congress intended to preserve fully "the right of labor organizations to bring pressure to bear on offending employers" and to shield "unoffending employers and others" only against the pressure of "secondary boycotts," not against the pressure generated by traditional primary strike activities which neutrals who do business with the offending employer at the situs of the dispute inevitably feel. *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 672-674; *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 686-688, 692.

The legislative history shows that in prohibiting secondary boycotts Congress sought to prevent unions from exerting strike pressure on neutral employers through their own employees for the purpose of forcing such neutrals in turn to exert pressure on the primary employer, and to prevent the proliferation of labor disputes by restricting use of the traditional weapons of economic conflict to the area of the dispute with the primary employer.

However, Sections 2 (3), 7, 13, the proviso to Section 8 (b)(4), and the legislative history of the Act show equally that Congress did not intend to impair the right to strike or to use strike-related weapons traditionally regarded as "primary," rights indispensable to exertion of effective strike pressure on the offending employer, and hence to the system of free collective bargaining which it sought to maintain. To the contrary, it is clear that Congress intended to preserve and protect these rights. Peaceful picketing

for the purpose of inducing employees of neutral employers not to work for the primary employer behind the picket line, as well as to induce all other persons not to serve or patronize the primary employer, was universally considered primary and was so regarded by Congress. In Sections 2 (3) and 7, Congress protected the right of employees of neutral employers to assist strikers by concerted activity. The proviso to Section 8(b)(4) shows that Congress knew that such assistance would involve refusing to work behind a picket line at the primary employer's premises.

To effectuate the dual objectives of Congress,—the elimination of what it understood to be secondary boycotts and the protection of traditional primary activity—it is necessary to read the language of Section 8 (b)(4)(A) as if the word "secondary" appeared in the text before "strike" and before "concerted refusal." Otherwise, the language outlaws all strikes and all "concerted refusals," *i.e.*, partial strikes. Since Congress could not have intended this result, the language must be read in the light of the legislative history which shows that Congress intended to outlaw only "secondary boycotts." This construction is supported by the recent amendment of the Act in which Congress reaffirmed that Section 8 (b)(4)(A) should not be read so as to outlaw "any primary strike or primary picketing."

The Board's initial approach to Section 8 (b)(4)(A) sought to give effect to Congress' concern with secondary boycotts while preserving the right to exercise primary strike pressure.

Where picketing occurred at premises occupied by the primary employer to which employees of neutral employers came only to perform services involving or benefiting the primary employer, the question "against whom is the picketing directed" was quite simple of solution. Since the only work or services performed by employees of

terest"[9] that existed between the employees of the primary and of the secondary employer and the "unity of interest" between the primary and secondary employers themselves.[10] Courts which had adopted these concepts held primary and lawful some types of strike pressures which other courts held secondary and unlawful. Partial strikes of employees of neutral employers consisting of refusals, at places remote from the dispute, to handle material or products belonging to, coming from, or destined for a struck employer *i.e.*, "hot goods", were in this category. Cf. *Duplex Co.* v. *Deering*, 254 U.S. 443; *Bedford Co.* v. *Stone Cutters Assn.*, 274 U.S. 37; *Loewe* v. *Lawlor*, 208 U.S. 274; with *Bossert* v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582; *Gill Engrav-*

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[9] The "community of interest" concept was articulated by Mr. Justice Brandeis in his dissenting opinion in *Duplex Co.* v. *Deering*, 254 U. S. 443, 479. Senator Pepper quoted from that dissent in opposing Section 8 (b) (4) (A) on that ground. 93 Cong. Rec. 4197, 2 Leg. Hist., p. 1104.

[10] The "unity of interest" concept was phrased as follows by the New York Court of Appeals in *Goldfinger* v. *Feintuch*, 276 N. Y. 281, 286, 11 N. E. 2d 910, 913:

> "Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a *nonunion product* sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public."

ing Co. v. *Doerr*, S.D.N.Y., 214 Fed. 111; *Pierce* v. *Stableman's Union*, 156 Cal. 70, 103 Pac. 324.[11]

A majority of Congress, however, considered such partial strikes unjustifiable. The Senate Report gave a concrete illustration of activity which proponents aimed to ban (S. Rep. No. 105, 80th Cong., 1st Sess., 22, 1 Leg. Hist. 428):

> "[It will be] an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the

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[11] In the same category was strike action directed against a general contractor on a building project because he had engaged the services of a non-union subcontractor. Some courts held that to call a strike against a general contractor to compel him to get rid of such a subcontractor was not a "secondary boycott." *Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663; *Cohn & Roth Electric Co.* v. *Bricklayers', etc., Local Union No. 1*, 92 Conn. 161, 101 Atl. 659; *Grant Construction Co.* v. *St. Paul Building Trades Council*, 136 Minn. 167, 161 N. W. 520. The preponderant view was to the contrary. In *International Brotherhood of Electrical Workers, Local Union No. 134* v. *Western Union Co.*, 7 Cir., 6 F. 2d 444. 445, the court said:

> "The things that were done were not done because of any violation by the employer of any term of the contract of employment. They were not done to induce the payment of higher wages, better working conditions, or for any other lawful purpose. But they were done to compel their own perfectly satisfactory employers, or the owners of the premises where appellee was doing or desired to do its installation work, to injure and annoy appellee, and to cause such employers to violate contracts with appellee for the sole reason that appellee employed nonunion men."

Accord: *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753; *Blandford* v. *Duthie*, 147 Md. 388, 128 Atl. 138; *Lehigh Structural Steel Co.* v. *Atlantic Smelting & Refining Works*, 92 N. J. Eq. 131; 111 Atl. 376; *Snow Iron Works, Inc.* v. *Chadwick*, 227 Mass. 382, 116 N. E. 801; *Jetton-Dekle Lumber Co.* v. *Mather*, 53 Fla. 969, 43 So. 590.

neutral employers at the picketed premises involved the primary employer, the inducement of such employees not to cross the picket line was clearly directed at the primary employer and was part of the pressure the union could lawfully bring to bear on the offending employer, regardless of its inevitable repercussion on the neutral employer. Thus, in *United Electrical and Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B. 417, 418, the Board held that picketing designed to induce employees of a neutral contractor to refrain from working on the primary employer's premises was primary "whether 1 or 100 employees [of the contractor] wish to enter."

Where, however, some or all of the work or service performed by employees of neutral employers at a "common situs" i.e., where, in addition to the primary employer, other employers were engaged in business, at least some of which did not involve the primary employer, a union's freedom to picket required restraint. In such cases, the Board sought to permit a striking union to appeal to neutral employees to refrain from such work and services as involved the primary employer, while at the same time prohibiting any unnecessary appeal to neutral employees to refrain from work or services not involving the primary employer. The Board required unions to picket only at times when the primary employer was engaged in business at the picketed situs; to picket as close to his business operation as feasible; and, to disclose clearly by their picket signs that their dispute was with the primary employer. *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 549. The Board recognized, however, that picketing of the primary employer at such a common situs could not be more severely restricted, for to do so would impair the union's Congressionally preserved right to bring pressure to bear on the primary employer.

Under the *Moore Dry Dock* approach, a separate or reserved gate can perform a legitimate function only where the neutral employees who use it perform no service for the primary employer. In such circumstances the neutral employees may not lawfully be subjected to picket line inducement, except insofar as such inducement is an unavoidable concomitant of primary picketing directed at those who are performing services involving the primary employer. It is therefore proper to isolate them and thereby avoid the incidental repercussions which occur when they pass through a common gate. Thus, it is perfectly proper for a factory owner to establish a reserved gate for the exclusive use of outside contractors to guard against incidental repercussions on his own employees of picketing in the event a union becomes involved in a dispute with one of the contractors. Since the factory owner is a neutral in such a dispute, and his employees perform no services for the contractors, they may appropriately be immunized from inducement. But the factory owner may not by the device of establishing a separate gate immunize contractors' employees who perform services for the factory owner at his factory against picketing directed against the factory owner when he is the offending employer in a labor dispute. In that case the intentional inducement of employees of neutral employers to withhold such services is an aspect of traditional primary picketing Congress intended to preserve. *United Electrical & Machine Workers (Ryan Construction Corporation), supra.*

In the quartet of secondary boycott cases decided June 4, 1951, this Court found the foregoing approach of the Board to be in "conformity with the dual congressional objectives * * *" (*N.L.R.B.* v. *Denver Bldg. & Construction Trades Council,* 341 U.S. 675, 692), and "expressed

IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176, et. seq.[12]; *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*, 325 U.S. 797.)"

The union attitude which forbade the use of material at the point of installation because of the character of its manufacture elsewhere, was summarized by Senator Taft to be: "We will not permit any material to come into New York City and be put into any building in New York City."[13] Each of the other illustrations of secondary activity cited by Senator Taft likewise pertained to creating a dispute at an independent employer's plant or place of business over the fact that the product there utilized or worked on was deemed objectionable by virtue of conditions which prevailed at the original place of its manufacture.[14] Thus, proponents of Section 8 (b) (4) (A) disagreed with the view that the interests of the employees involved in the primary dispute justified workers employed by other employers in assisting them by refusing, at places remote

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[12] ". . . The boycott we are objecting to operates like this: The A. F. of L. International Brotherhood of Electrical Workers controls the labor that installs electrical construction materials of all kinds. This IBEW refuses to install and brings pressure on contractors and wholesalers to prevent them from handling any of these electrical construction materials unless they have been manufactured by IBEW labor *in the original plants.*" (Emphasis supplied.) 1 Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. 176-177. As explained by the Second Circuit during its consideration of the case, the labor weapon involved was "refusal to work upon disfavored goods." *Allen Bradley Co.* v. *Local Union No. 3*, 145 F. 2d 215, 219 (C.A. 2), reversed, 325 U. S. 797.

[13] 93 Cong. Rec. 4199, 2 Leg. Hist. 1107.

[14] 93 Cong. Rec. 3838, 4199, 2 Leg. Hist. 1012, 1107-1108.

approval of the Board's *Ryan* decision." *Retail Fruit & Veg. Clerks' U.* v. *N.L.R.B.*, 9 Cir., 249 F. 2d 591, 596. It repudiated the Fifth Circuit's rejection in *Rice Milling* of the distinction between primary and secondary action, and held that the intentional inducement of employees of a neutral employer to refrain from performing work or services beneficial to the primary employer at his premises was "no more than traditional and permissible in a primary strike." At the same time, it noted, whereas the locale of the inducement is not controlling, the nature of the action sought to be induced is. Thus, if the union had attempted to induce the employees of the neutral employer in *Rice Milling* to take concerted action "more widespread" than refusal to cross the primary picket line, its conduct would not have been immune. In *Denver* and in *Langer (International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694) this Court sustained the Board's conclusions that the unions' strike action was secondary because it was directed against neutral employers and not against the primary employers. The Court agreed with the Board that neither the relationship between contractor and subcontractor, nor the fact that they were engaged on a common project at the same location, justified the unions in treating the separate employers as one and the same. The opinions cannot fairly be read as implying that any strike action or picketing which has as "an object" disruption of business relations between two employers is *prima facie* unlawful. Nor can they be read as holding or implying that the action induced in *Rice Milling* was "permissible" only because it was not "concerted" in that it was engaged in only by two, rather than more, employees of the neutral employer.

rom the primary dispute, to handle or work on the primary employer's goods. They therefore rejected the contention hat such refusals should not be characterized and condemned as "secondary boycotts."

3. Congress Intended to Preserve With the Right to Strike the Traditional Primary Pressure Which is Essential to Effective Strike Action

The legislative history shows equally clearly that Congress did not intend, by outlawing secondary boycotts, to mpair in any degree the effectiveness of primary strike pressure. Thus, Senator Taft stressed (93 Cong. Rec. 3835, 2 Leg. Hist. 1007):

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. * * * So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

In summing up the bill, which became the Act, upon its return from conference, Taft reiterated, (93 Cong. Rec. 6445-6446, 2 Leg. Hist. 1544):

> "The conferees rejected the broad prohibition of all kinds of strikes. * * * The only strikes which are de-

II

The Board's reversal of *Ryan* in this case is predicated upon a new approach to Section 8 (b)(4), under which the Board looks to the language of the Section read literally and ignores the legislative history for "the essence of the relevant proscription." *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 N.L.R.B. 1844, 1845. Doing this enables it to discard Congress' exemption of "traditional primary strike action" from the statutory ban and to substitute its own notion of what strike action should be held permissible.

The key to the Board's current concept is its assumption that the only pressure which a union is entitled to exert upon a primary employer is that which it can create through work stoppages of the primary employer's employees. *Local 657, Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981, 983. That assumption stems from reading Section 13 narrowly as protecting only the right to cease work. *Local 618, Automotive Employees Union (Incorporated Oil Company)*, 116 N.L.R.B. 1844, 1847. It overlooks that "Picketing has been equated with striking for the purposes of § 13" (*N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. 274, 281, n. 9); it discards Sections 7, 2 (3), and the proviso to Section 8 (b)(4); and it "ignores elementary information as to traditional multiple purposes of primary picketing of which Congress must have been aware when it definitely protected primary picketing under the Act." *Local 618*, supra, 116 N.L.R.B., at 1855.

By thus restricting the allowable scope of economic pressure, the Board brushed aside Congress' judgment that only *secondary* pressures should be outlawed and all *primary* pressures should be retained, and thereby made room

clared to be illegal are secondary boycotts and jurisdictional strikes."

To do "nothing to outlaw" primary strikes was necessarily to preserve, not merely the right to cease work, but all of the traditional means by which strikers exert primary economic pressure on the employer. The most "traditional" of these is picketing at the employer's premises.

1. The Traditional Object of Primary Picketing is to Evoke a Sympathetic Boycott of the Primary Employer at the Situs of the Dispute.

The object of primary picketing never has been limited to inducing employees of the primary employer to strike and prospective replacements to refrain from taking the place of the strikers. Just as picketing is not a simple corollary of a strike in the sense that the right to picket does not depend on the existence of a strike,[15] so it is not a simple corollary of the strike in the sense that picketing, unlike striking, is not aimed only at the employer's labor supply. Picketing is a weapon of economic conflict designed to prevent the offending employer from carrying on his business during the labor dispute. "Peaceful picketing is the workingman's means of communication." *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, 293. Pickets "stationed at the place of business involved in the dispute"

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[15] "Picketing without a strike is no more unlawful than a strike without picketing." *Exchange Bakery* v. *Rifkin*, 245 N.Y. 260, 263, 157 N.E. 130, 132. "Picketing for organizational purposes or to call attention to unfair conditions—where all other attributes of primary action are present—has never been considered to attain a secondary character, simply because no strike, strikebreakers or replacements are to be found on the picketed premises." *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 567.

for exercise of its own judgment as to which incidents of primary picketing should be tolerated and which should not. From the new assumption as to the legitimate object of primary pressure, it followed that picketing and related inducement of employees of neutral employers is illegal unless it accompanies an appeal to the primary employer's employees, and, even if it does, a question remains whether it runs afoul of the express prohibition of Section 8 (b)(4)(A).

Under the guise of applying the *Moore Dry Dock* tests, the Board judged that new issue in terms of whether the impact of the picketing on *employees* of neutral employers was "inevitable and incidental" or intentional and avoidable. Thus, the *Moore Dry Dock* conditions, which were designed to confine intentional, avoidable inducement of employees of neutral employers to such of their work as involved the primary employer, now were used to outlaw avoidable, intentional inducements relating to that very work. The new approach thus rendered illegal precisely that conduct which the *Moore Dry Dock* standards were designed to preserve.

The Board's new approach prohibits primary picketing where the primary employer temporarily removes his employees from the situs; where the Board finds picketing "unnecessary" to enable the union "adequately" to appeal to the primary employer's employees; as well as where the primary employer provides a separate gate or entrance, or even separate identification, for employees of neutral employers who come to his premises to serve him during a strike. This approach, Courts of Appeals have recognized, is destructive of union rights which Congress protected. *Local 618, Etc.* v. *N.L.R.B.*, 8 Cir., 249 F. 2d 332; *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105

aim "at three points: first, at the employer's labor market; second, at his supply market, and third at his sales market." Restatement, Torts, Volume IV, Ch. 38, Topic 3, pp. 138-139; Sec. 779, Comment f, pp. 109-110. Their object is to maximize economic pressure on the primary employer by seeking "to dissuade workers and others from entering the plant for purposes of business or from otherwise doing business with the employer." *Ibid.*; *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318; *International Brotherhood of Teamsters, Etc. (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504-505; *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 548.

When used in a primary strike, the purpose of picketing is "to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Thornhill* v. *Alabama*, 310 U.S. 88, 99. Everyone engaged in "publicizing the facts of a labor dispute" has "a purpose to persuade others not to buy merchandise *or perform services*." [Emphasis added.] *Carlson* v. *California*, 310 U.S. 106, 112. They intend to persuade all those reached by the message "to refrain from entering into advantageous relations with the business establishment which is the *scene of the dispute*." [Emphasis supplied.] *Thornhill* v. *Alabama*, 310 U.S. 88, 104.

What makes "the picket line * * * truly a formidable weapon" is its "appeal for solidarity" to other workers: "The reluctance of workers to cross a picket line is notorious." *Printing Specialties and Paper Converters Union* v. *LeBaron*, 9 Cir., 171 F. 2d 331, 334. The traditional function of primary picketing, therefore, is to appeal "to all union sympathizers," including employees of neutral

U.S. App. D.C. 211, 265 F. 2d 585; *N.L.R.B.* v. *General Drivers, Local 969*, 5 Cir., 225 F. 2d 205, cert. den. 350 U.S. 914; *Sales Drivers, Helpers, Etc., Local 859* v. *N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F. 2d 514, cert. den. 351 U.S. 972; *N.L.R.B.* v. *International Union of United Brewery, Etc. Workers*, 10 Cir., 272 F. 2d 817; *N.L.R.B.* v. *International Brotherhood of Teamsters, Local 294*, 2 Cir., —F. 2d—, decided Nov. 10, 1960, 47 LRRM 2085.

The Board attempts to justify application of its new approach on the theory that otherwise legality of picketing in cases such as the case at bar would turn on "title to property." At no time did the Board's approach turn on "title to property." Its initial approach was aimed at eliminating at a situs of dispute the inducement of employees of neutral employers engaged in performing work unrelated to the primary employer, regardless of "title" to the premises. The very cases on which the Board relies as justifying its current approach are in accord with its initial approach. *Office Employes International Union* v. *N.L.R.B.*, 105 U.S. App. D.C. 13, 262 F. 2d 931; *Retail Fruit & Veg. Clerks U.* v. *N.L.R.B.*, 9 Cir., 249 F 2d 591; *N.L.R.B.* v. *Local Union No. 55*, 10 Cir., 218 F. 2d 226; cf. *United Brick & Clay Workers* v. *Deena Artware*, 6 Cir., 198 F. 2d 637, cert. den. 344 U.S. 897.

The Board also attempts to distinguish between inducement of neutral employees on the basis of the duration of their employer's presence at the primary employer's premises. This distinction appears to be designed to capitalize on the "happen to approach" language wrested out of its context in this Court's *Rice Milling* opinion. But if it is intended to distinguish between neutral employers in terms of the impact of inducement of their employees on the neutral employer's business, it is wide of the mark. A customer who distributes only one product—that of the

employers who patronize or serve the primary employer at the situs of the dispute, "not to cross the imaginary 'line'." *Local 618, Etc.* v. *N.L.R.B.*, 8 Cir., 249 F. 2d 332, 336.

Unlike the differences of opinion which had developed at common law and under some statutes as to whether other strike tactics were primary or secondary (pp. 26-27, *supra*), there was common understanding that picketing of a struck employer at his own place of business was primary action and that the response such picketing was designed to evoke was a primary, not a secondary boycott.[16] As two writers put it (Barnard and Graham, *Labor and the Secondary Boycott*, 15 Wash. L. Rev. 137, 141, 144 (1940)):

> "* * * in so far as purely peaceful picketing of *R's* [primary employer's] place of business by *E* [employees of primary employer] seeks to persuade customers (*C*) i.e., third parties (*T*), not to patronize *R* and other employees (*E*) not to work for *R*, such picketing contains at least the analytical elements of the 'secondary boycott' since *T* has effectively been brought into the picture. *It is, however, recognized that peaceful picketing of R by E has never been designated by the courts as a secondary boycott.* * * *
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> "* * * unquestioned recognition has now been accorded the legality of the peaceful picketing of *R* by

[16] E. g., *Schivera* v. *Long Island Lighting Co.*, 296 N. Y. 26, 69 N. E. 2d 233; *Gruet Motor Car Co.* v. *Briner*, 229 S. W. 2d 259 (Mo. App.); *Consolidated Realty Co.* v. *Dyers, etc. Federation*, 137 N. J. Eq. 413, 415-416, 45 A. 2d 132, 133-134; *Wright* v. *Teamsters Union Local*, 33 Wash. 2d 905, 913, 207 P. 2d 662, 666; *Northwestern Pacific Railroad Co.* v. *Lumber & Sawmill Workers' Union*, 31 Cal. 2d 441, 447-448, 189 P. 2d 277, 281.

struck employer—can be as severely injured by the refusal of his employees to pick up merchandise across a picket line at the primary employer's premises, conduct which the Board immunizes and protects, as a building contractor can be harmed by refusal of his employees to continue work on a struck employer's plant premises.

At bottom, however, the vice in the Board's approach is that it undertakes to reevaluate factors which were the elements of Congress' own policy judgment. What the Board did in *Moore Dry Dock*, and what this Court approved as being consistent with Congress' policy, was to refine the line of demarcation between exercise of the right of unions to strike and the right of neutral employers to be immune from secondary strike pressure. To the extent that the union directed its attack against the primary employer only, any repercussions on the neutral employer were treated as immaterial incidents of primary conduct.

Under the new approach, the Board draws a line of demarcation between what it considers effective strike pressure on the one hand, and the interest of neutrals in avoiding all repercussions of strike action on the other. That is not only a perversion of the *Moore Dry Dock* rules, but also a usurpation of Congress' province to determine where, in the area of economic conflict, the line between the permissible and the unlawful should be drawn. The Board is not permitted under "the guise of administration" to substitute its own policy for Congress' policy, "to put limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363. Just as the Board is not permitted under the "guise of determining good or bad faith in negotiations" to "regulate what economic weapons a party might summon to its aid," (*N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 490), so is it not

> *E*, albeit an objective is admittedly to influence *T* • • • [such cases are those] involving union activity *in geographical proximity to the employer's place of business.* • • •" [Emphasis added].

As another writer stated (1 Teller, *Labor Disputes and Collective Bargaining*, 456 (1940)):

> "It has never been suggested that pickets engaged in peaceful primary picketing may be said to be engaged in secondary picketing where, without picketing third parties, they seek whether through the distribution of literature or otherwise to enlist the support of third parties."

In *Ex parte Henry*, 147 Tex. 315, 326, 215 S.W. 2d 588, 595, the court said:

> "• • • it seems to be the position • • • that since the employees of the railways would not cross the picket line manned by [members of the striking union], the picketing *and the consequent refusal of the railway employees to serve the* [primary] *employer's plant* constitute such concerted action between [members of the striking union] and these employees as to amount to secondary picketing and boycotting • • • [P]icketing does not offend • • • *merely because third parties who come to the area of the dispute may prove sympathetic to one disputant rather than to the other.*" [Emphasis added.]

In *Bond* v. *Dodge*, 217 Ark. 919, 924, 234 S. W. 2d 204, 207, the court said:

> "A secondary boycott occurs when striking employees, in addition to picketing the premises of their own employer, also establish picket lines around the premises

permitted, under the guise of distinguishing between primary and secondary boycotts, to outlaw primary picketing because it believes the repercussions on neutral employers are too severe or "unnecessary."

ARGUMENT

The Issue Defined

The question underlying this case is whether it is a permissible object of primary picketing in a labor dispute to induce employees of customers, suppliers and others who perform services of benefit to the primary employer at his place of business to refrain during the labor dispute from rendering such services to him. If it is, then the judgment below must be reversed. For, despite the statement of the court below that by its peaceful picketing the union "sought to encourage the employees of the independent contractors to engage in a concerted refusal to perform *any* services for their employers" (R. 199-200, emphasis supplied), the evidence is unequivocal that the *only* services which the union sought to induce employees of the contractors not to perform were services directly involving General Electric's business at General Electric's plant, the situs of the labor dispute. The Trial Examiner explicitly so found (R. 35) and nowhere in its decision did the Board, or the court below in its discussion of the facts, take issue with that finding. Indeed, the evidence specifically shows that when, as a result of the picketing, the contractor's employees abandoned work on General Electric's projects at Appliance Park, they were directed by their employers to work, and without any hindrance from the union did work, elsewhere on projects for customers other than General Electric. (R. 78, 83).

If, on the other hand, the Board is empowered to declare that the only legitimate object of primary picketing at a

of others not so directly interested in the labor dispute, such as customers to whom the primary employer sells or manufacturers from whom he buys."

In *Missouri Pac. R. Co.* v. *United Brick & Clay Workers' Union*, 218 Ark. 707, 709, 710-711, 238 S. W. 2d 945, 946, 947, the court said:

> "This case differs from the average only in that the pickets patrol an isolated RR crossing instead of a sidewalk used by the general public. But the railroad track is a means of access to the Acme plant, and we think it immaterial that the one company alone habitually uses this entrance. • • •
>
> "If we assume, without deciding, that a secondary boycott is unlawful in Arkansas, we find no such boycott in the appellees' conduct. The picket line is maintained as close to Acme's plant as is possible without a trespass. • • • The fact that [a neutral employer] alone is affected is immaterial. *Like most picket lines this one has among its purposes that of discouraging outsiders from doing business with the strikers' former employer.* In its present location the picketing is primary and not secondary." [Emphasis supplied.]

This view was predicated upon the traditional concept of a "primary boycott" as being a "withholding of patronage and refusal to trade" with the offending party. Frankfurter & Greene, *The Labor Injunction*, (Macmillan Co., 1930), p. 43.[17] The Supreme Court had defined the secondary boycott in *Duplex Co.* v. *Deering*, 254 U.S. 443, 466 as:

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[17] Accord: Oakes, *Organized Labor and Industrial Conflicts* (1927), Section 408.

manufacturing establishment is to induce employees and prospective employees of the primary employer to make common cause with the strikers or pickets, then the Board's outlawry of Petitioner's picketing at Gate 3-A may be sustained. The Petitioner has at all times freely admitted that its object in picketing at Gate 3-A was to appeal to employees of the contractors not to serve General Electric, the primary employer, behind the picket line. It has never maintained that its inducement of the contractors' employees by picketing there was merely an unavoidable consequence of picketing directed at and designed to reach GE's employees.

Under the Board's initial approach to Section 8 (b)(4)(A), picketing indistinguishable from the picketing here in issue was held lawful and protected. *United Electrical & Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B. 417. That approach was found by this Court to be in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Bldg. and Construction Trades Council*, 341 U.S. 675, 692. Indeed, in *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 672-673, n. 6, this Court "expressed approval of the Board's Ryan decision. * * *" *Retail Fruit & Veg. Clerks' U. v. N.L.R.B.*, 9 Cir., 249 F. 2d 591, 596.

Nevertheless, the Board thereafter jettisoned this approach, and, as it has now admitted, *Local No. 36, International Chemical Workers Union (Virginia-Carolina Chem. Corp.)*, 126 N.L.R.B. No. 117, 45 LRRM 1407, its instant decision and *Ryan* cannot stand together. Unless the Board and this Court were wrong the first time, the judgment below must be reversed.

"* * * a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

That definition was "generally accepted". Teller, *Labor Disputes and Collective Bargaining* (Baker, Voorhis & Co., 1940), Vol. I, p. 455. Frankfurter & Greene, *op. cit., supra, ibid.*

When employees of neutral employers refuse to cross a picket line to perform work or render services beneficial to the offending employer at his place of business they are exerting pressure on him directly, not indirectly through the medium of their own employer. The primary employer himself observes and feels immediately the economic effect of this withholding of services. News and effect of the neutral employees' sympathetic action does not reach him only indirectly, when he is told about it by their employer. It is true, of course, that the neutral employer is not unaffected by such refusal of his employees to perform work or render services beneficial to the offending employer at the latter's place of business. To the extent that his business with the offending employer is carried on through the employees who refuse to cross the line, that business is automatically interrupted. Moreover, he may, as a result of that refusal, be "under greater or less economic pressure to end all business relations with the primary employer". *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591. But such pressure as the neutral employer feels is an in-

I. THE BOARD'S INITIAL APPROACH PROPERLY EFFECTUATED THE INTENTION OF CONGRESS TO PROTECT TRADITIONAL PRIMARY STRIKE ACTION.

A. Congress Intended to Outlaw in Section 8(b)(4)(A) Only Those Strikes and Inducements to Strike Which Were Familiar to it as "Secondary Boycotts."

The legislative history shows that Congress intended to outlaw only strikes and partial strikes which it considered "secondary." In his major speech introducing the Senate version of the bill which became the Act, Senator Taft thus summarized the effect of Section 8 (b)(4)(A): "It is made an unfair labor practice for any union to engage in a secondary boycott."[5] Throughout the Congressional deliberation upon 8 (b)(4)(A), its purpose was repeatedly described as the elimination of the "secondary boycott" from the arsenal of permissible union weapons.[6] In explanation of its aim, the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 22, 1 Leg. Hist. 428):

> "* * * it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals

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[5] 93 Cong. Rec. 3838, 2 Leg. Hist. 1012. "Leg. Hist." refers to the two volume edition entitled "Legislative History of the Labor Management Relations Act, 1947" (G.P.O., 1948).

[6] S. Rep. No. 105, 80th Cong., 1st Sess., 7, 8, 22, 54, 1 Leg. Hist. 413, 414, 428, 460; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, 1 Leg. Hist. 547; 93 Cong. Rec. 4131, 4138, 4837-38, 4858, 4859, 4865, 5005, 5011, 6445-46, 7537, A. 2252, 2 Leg. Hist. 1055, 1068, 1354-55, 1364, 1365, 1370-71, 1372-73, 1383, 1479, 1491, 1544, 1654, 1524.

cidental consequence, not a purpose or object, of his employees' action. *Douds* v. *International Longshoremen's Assn.*, 2 Cir., 224 F.2d 455, 459, cert. den., 350 U.S. 873.

For these reasons, the "activities of pickets at the place of their own employment where they are using the picket line to enforce their right to strike against their own employer is called a primary activity in the language of labor law." *Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869. And, whether made on the picket line, or by oral or written communication elsewhere, "a request to respect a primary picket line *at the Employer's premises* • • • is traditional primary strike action." *Oil Workers International Union, Local Union 346, (The Pure Oil Company)*, 84 N.L.R.B. 315, 319; *Newspaper & Mail Deliverers' Union (Interborough News Company)*, 90 N.L.R.B. 2135.

2. The Sympathetic Primary Boycott is Essential to Effective Strike Pressure.

Long ago it was recognized that the right to engage in primary picketing is as essential to self-organization and collective bargaining as the right to strike. A state, it was held, could not outlaw primary picketing "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace." *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326. If workers were denied the right to induce a primary boycott of their employer they would have little if any power to engage in economic conflict with him over the terms and conditions of their employment. "Little indeed would be left of the right to strike • • •, if the striking employees were denied the concomitant right

in the goods of or does business with employer B (with whom the union has a dispute)."

Senator Taft said:[7]

"The difficulty with the Clayton Act and the Norris-LaGuardia Act is that they went at the situation with a meat ax. They practically eliminated all legal remedy against unions for any action taken by them. In effect they provide, as construed by the courts, at least —that any action by a union taken in order to advance its own interests is proper, and there is no legal recourse against the union. The laws referred to *do not discriminate between strikes for justifiable purposes and strikes for wholly illegal and improper purposes. They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of secondary boycotts* * * *. The acts simply eliminated all remedy against any union, leaving the union leaders free, practically without any control even by their members, to order strikes and boycotts and various kinds of actions that interfered, I believe certainly unlawfully under common law, with the activities of many other persons who were entirely innocent." [Emphasis added.]

Senator Pepper, quoting, *inter alia*, President Truman, contended that resort to a secondary boycott should be made illegal only if the union's objective in the primary dispute is improper or unjustifiable. 93 Cong. Rec. 4198-4199, 2 Leg. Hist. pp. 1107, 1108-1109. Senator Taft stated

[7] 93 Cong. Rec. 3835, 2 Leg. Hist., pp. 1005-1006.

of peacefully picketing the immediate business of their employer." *International Brotherhood of Teamsters, Etc. (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504-505. "Such picketing, virtually synonymous with the right to strike, is an exercise of a historic right thought necessary to the effectiveness of a strike." *Ibid.*, at p. 507. If primary picketing were outlawed "the effect of a strike would be vastly attenuated" (*Douds* v. *Metropolitan Federation of Architects, Etc.*, S.D.N.Y., 75 F. Supp. 672, 675); "strikes would often be hopelessly crippled." *N.L.R.B.* v. *Service Trade Chauffeurs, Etc.*, 2 Cir., 191 F.2d 65, 67.

C. The Act Preserves the Right to Induce Neutral Employees to Engage in a Sympathetic Primary Boycott.

In the Wagner Act (Section 1) Congress sought to promote equalization of the bargaining power of workers with employers by protecting the right of employees to "assist" labor organizations and to engage in "concerted activities for mutual aid and protection" (Section 7). Because the term "employee" as defined in Section 2(3) and used in Section 7 was "not limited to the employees of a particular employer," the Act enabled striking employees to enlist the support of employees of other employers. Indeed, because the protection so accorded was unqualified, the Act protected even secondary boycotts. *N.L.R.B.* v. *Peter C. K. Swiss Choc. Co.*, 2 Cir., 130 F.2d 503, 505-506.

When Congress passed the Taft-Hartley Act it decided that to protect secondary boycotts was to go too far, and it enacted specific provisions, Sections 8(b)(4)(A) and (B), to outlaw them. *Supra*, pp. 22-29. At the same time, it did not abandon the objective—enhancement of the bargaining power of employees with respect to their employer

that the draftsmen had considered and rejected the view that the Section should distinguish between secondary boycotts in terms of the merits of or justification for the union's position in the primary dispute. He said (93 Cong. Rec. 4198, 2 Leg. Hist. 1106, 1107, 1108):

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator [Pepper] will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, *no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.* It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference *between different kinds of secondary boycotts.* So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice. * * * Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory on both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some produce which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands

of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that. * * *

"[We condemn the view] that if other workers do not like the way some employer is treating his employees, they can promote strikes in any other plant which happens to be handling the product of the plant whose management the workers do not like. * * * I do not see how we can distinguish between a plant employing union labor and a plant employing non-union labor or between a plant paying good wages and a plant paying poor wages. * * * The members of the Committee do not see any way of distinguishing between those cases * * *."

Section 8(b)(4)(A) was also criticized on the ground that it prohibited workers employed by other employers from supporting strikers by refusing, in their own shops, merely to handle or work on goods coming from or destined for a struck employer.[8] It was contended that this prohibition unjustifiably disregarded the "community of in-

[8] 93 Cong. Rec. 4196-4197, 4844-4845, 4859, 2 Leg. Hist., pp. 1104-1105, 1106-1107, 1366-1368, 1371; see also the President's veto message, 1 Leg. Hist., p. 918

—for which protection of "employee" concerted activity was accorded. And it did not limit the definition of "employee" in Section 2 (3) to employees or prospective employees of the particular employer involved in the dispute. Thus, subject only to the prohibition against secondary boycotts, the right of strikers to enlist the sympathetic support of employees of other employers remained protected.

In the concluding proviso to Section 8 (b)(4), Congress demonstrated that it understood that preservation of traditional strike pressure meant that a striking union would remain free to induce employees of neutral employers to refuse to perform services "upon the premises" of the struck employer, since it provided that nothing in Section 8 (b) (4) should be construed to make such a refusal "unlawful."[18] *N.L.R.B.* v. *Rockaway News Co.*, 345 U.S. 71, 80; *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135, 2146-2149; *Teamsters, Local 87 (DiGiorgio Wine Company)*, 87 N.L.R.B. 720, 746.

"Congress did not seek, by § 8 (b)(4), to interfere with the ordinary strike * * *. By § 13, Congress has made it clear that § 8 (b)(4), * * * [may not] be read so as to interfere with, impede or diminish the union's traditional right to strike, [unless] such interference, impediment or diminution is 'specifically provided for' * * *". *N.L.R.B.*

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[18] The proviso reads as follows:

"*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

The proviso was retained in the same place in the Act as amended in 1959.

. *International Rice Milling Co.*, 341 U.S. 665, 673, citing *Amalgamated Assn. of Employees* v. *Wisconsin Board*, 340. U.S. 383, *United Electrical & Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B. 417, 418, and *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318-320. "Picketing has been equated with striking for the purposes of § 13." *N.L.R.B.* v. *Drivers Local Union 639*, 262 U.S. 274, 281, n. 9, citing *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, and *International Brotherhood of Teamsters, Local No. 807 (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502. Consequently, to induce compliance with their demands; employees and their union may "under § 13 strike and under § 7, peacefully picket the premises of their employer • • • ". *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75.

D. To Effectuate the Dual Objectives of Congress, the Language of Section 8(b)(4)(A) Must be Read as Applying Only to Secondary Strikes, Both Total and Partial, and Their Inducement.

From the outset the Board took the position that since Congress intended to preserve primary strike action, and to outlaw only secondary, not primary, boycotts, the language of Section 8 (b)(4)(A) must be construed as if the word "secondary" appeared in the Section before the terms "strike" and "concerted refusal." *International Brotherhood of Teamsters (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504, n. 3 and accompanying text; *Oil Workers International Union, Local Union 346 (The Pure Oil Co.)*, 84 N.L.R.B. 315, 318, 319.

So qualified, the language of Section 8(b)(4)(A) would outlaw all union conduct which the legislative history showed Congress wished to reach and would effectuate Con-

gress' intention to limit "the scope of industrial conflict and the economic effects of the primary dispute" (*Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 106) by restricting "the area of industrial conflict" (*ibid.*, 357 U.S. at 100), to the situs of the primary dispute.

On the other hand, failure so to treat the "secondary" qualification as implicit would result in outlawing all primary strikes and traditional primary activity. No distinction between primary and secondary activity can be spelled out of the language of Section 8(b)(4)(A) itself. Every primary strike has as "*an* object thereof" to force the employer to "cease doing business" with another person in the hope that the resulting loss will force him to yield to the union's demand. The words "have sufficient latitude" to "reach out to and include" the effect of a strike in causing an interruption of "the business relation between an employee of the primary employer * * * and the primary employer * * *." *Douds* v. *Metropolitan Federation of Architects, Etc.*, S.D.N.Y., 75 F. Supp. 672, 675. As Judge Learned Hand pointed out in *Douds* v. *International Longshoremen's Assn.*, 2 Cir., 224 F. 2d 455, 459, cert. den., 350 U. S. 873, "cessation of business" is "the only sanction" any strike or concerted refusals to work "can have." In this respect there is no distinction between a primary strike and a secondary strike. Each has the *tactical* objective of causing a cessation of business in furtherance of the *ultimate* objective, i.e., acquiescence in a demand. To distinguish between the two it is necessary to go beyond the "an object" test to the nature of the demand being made upon the struck employer.

In a primary strike that demand relates to unionization or terms or conditions of employment in the struck employer's establishment; the union's ultimate objective is to affect the struck employer's relations with his own employees. In a secondary strike the demand relates to

organization or conditions of employment of employees of another employer; the strike is used as a medium by which to exert pressure on an employer whose own employment policies and practices are not in dispute to induce him in turn to exert pressure on another employer to force the latter to yield to the union's demand. In other words, in a secondary strike the union's ultimate demand relates to the terms and conditions of employment of persons employed by, or seeking employment with, someone other than the employer against whom strike pressure is directed. *Douds* v. *International Longshoremen's Assn., supra; Douds* v. *Metropolitan Federation of Architects, Etc.*, S.D. N.Y., 75 F. Supp. 672, 675; *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 216-218, 265 F. 2d 585, 590-592.

Just as it is necessary to go beyond the words of Section 8(b)(4)(A) to distinguish between the primary and the secondary in the case of total strikes, it is also necessary to do so in the case of "concerted refusals."[19] When, for instance, at the request of pickets, two or more employees of a neutral employer, out of sympathy with strikers, refuse to cross a picket line at the struck employer's premises, unless their own employer desires that they not

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[19] The language of Section 8 (b) (4) (A) reflects careful draftsmanship to reach all strike action which Congress desired to illegalize. The outlawry of "strikes" contemplates a total work stoppage by employees of a neutral employer. The parallel outlawry of "concerted refusals" envisions the partial strike, *i.e.*, refusal only to work on or handle goods of or for the primary employer. The phrase "concerted refusal" of "the employees of any employer" to perform "work" or render "services" is the dictionary definition of "strike." See, Webster's New International Dictionary (G. & C. Merriam Co., 1960), p. 2496; Black's Law Dictionary (West Publishing Co., 1951), p. 1591; American College Dictionary (Random House, 1952), p. 1198, definition 60.

cross (*Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 102, 105-107), they are engaged in a "concerted refusal" to serve their own employer at the struck premises.

Since every work stoppage by neutral employees entails, *pro tanto*, a cessation of business, resort to the "an object" test is no more useful in distinguishing between sympathetic primary support, which employees of neutral employers may lawfully extend to strikers, and sympathetic secondary support, which they may not, than it is in distinguishing between primary and secondary in the case of total strikes. To apply the "an object" test without distinguishing between supporting action which is primary and that which is secondary would convert "lawful primary action" into unlawful "secondary action" and "might well outlaw virtually every effective strike. * * *" *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 320. Undifferentiated application of the "an object" test would mean that by picketing a struck employer's premises, at least if it is successful in inducing two or more employees of a neutral employer to stay out, the union has resorted to an illegal secondary boycott. Since "activities * * * directed solely toward maintaining the observance of [a] primary picket line [by employees of neutral employers do] not fall within the ban against secondary activity" (*Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869), such a conclusion could not be valid. *Milwaukee Plywood Company* v. *N.L.R.B.*, 7 Cir., No. 12991, decided Dec. 20, 1960; *Seafarers International Union Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591. It is necessary, therefore, to look elsewhere than the language of Section 8(b)(4)(A) for the key to differentiation between primary and secondary partial strike action by neutral employees.

Clearly, the key cannot lie in ascertaining whether the neutral employer whose employees were induced to take sympathetic action was injured thereby. *Any* unauthorized sympathetic action on the part of the neutral's employees affects his business relations and necessarily injures the neutral employer. Therefore, the presence or extent of such injury cannot aid in distinguishing its source as primary or secondary activity. If the activity is primary, the resulting "harm" to the neutral employer is merely "incidental" to the exercise of a legal right, not a basis for finding violation. See pp. 100-102 *infra*. To hold otherwise "would be virtually to deprive [unions] of a weapon which Congress meant to preserve." *N.L.R.B.* v. *Service Trade Chauffeurs, Etc.*, 2 Cir., 191 F. 2d 65, 67, 68.

At the same time, if the activity which the union sought to induce neutral employees to engage in is secondary, the union should not gain immunity because its "inducement" or "encouragement" did not succeed. Even if the neutral employees fail to respond to the appeal, and the neutral employer, in consequence, suffers no injury, the union's resort to illegal inducement should stand as a violation.[29]

Injury to the neutral employer could not provide a basis for distinction for yet another reason. Congress did not undertake in the Act to safeguard neutral employers, or primary employers or the public either for that matter, even against the injuries effected by "*secondary* boycotts as such." [Emphasis supplied.] *Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 99-100. Under Section

[29] *N.L.R.B.* v. *Associated Musicians*, 2 Cir., 226 F. 2d 900, 904-905, cert. den., 351 U.S. 962; *N.L.R.B.* v. *Knitgood Workers Union, Local 155*, 2 Cir., 267 F. 2d 916, 920; *N.L.R.B.* v. *Dallas General Drivers, Etc., Local No. 745*, 5 Cir., 264 F. 2d 642, 648, cert. den., 361 U.S. 814; *N.L.R.B.* v. *Laundry, Etc. Drivers Local No. 928*, 9 Cir., 262 F. 2d 617, 620.

8(b)(4)(A) as it originally stood a union could lawfully coerce a neutral employer to engage in a boycott by threatening to induce his employees to strike. *Schatte* v. *International Alliance of Theatrical Stage Employees*, 9 Cir., 182 F. 2d 158, 165, cert. den., 340 U.S. 827; *Rabouin* v. *N.L.R.B.*, 2 Cir., 195 F. 2d 906, 911-912.[21] It was free to exert pressure on the neutral by invoking a consumer boycott against him. *Ibid.* If the secondary employer succumbed to such pressure and ceased to do business with the primary employer "there is no unfair labor practice." *Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 99. The resulting injury to the neutral employer is the same whether he succumbs as a result of a strike threat, a consumer boycott, or an actual strike of his employees or its inducement. Therefore injury to the neutral employer plainly could not provide the touchstone for distinguishing between outlawed secondary and permitted primary conduct.

The key to the distinction can lie only in the other provisions of the Act and in the legislative history which show that Congress did not intend to outlaw "any of the primary means which unions traditionally use to press their demands on employers." *Oil Workers International Union, Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318. Picketing at the primary employer's

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[21] Congress in the 1959 Act made it unlawful to threaten, coerce, or restrain a neutral employer to compel him to engage in boycott. Act, Section 8 (b) (4) (ii) B, see 105 Daily Cong. Rec. 13092, July 27, 1959, II Leg. Hist. L.M.R. & D.A. 1523 (1). To induce an employer to engage in a boycott by persuasion remains lawful. See 105 Daily Cong. Rec. A4308, May 21, 1959, A8464, Sept. 30, 1959, II Leg. Hist. L.M.R. & D.A. 1750(1), 1841(3). "Leg. Hist. L.M.R. & D.A." refers to the two volume work "Legislative History of the Labor-Management Reporting and Disclosure Act of 1959" (G.P.O. 1959).

premises is such a traditional primary means, pp. 30-36, *supra*. Consequently, the normal, expected response of employees of neutral employers—refusal to render service or perform work behind such a picket line—must be considered primary, not secondary, sympathetic action.

Just as it is necessary to determine whether a strike or partial strike is primary or secondary before the "object" language of Section 8(b)(4)(A) can come into play, so it is necessary to determine whether strike action which a union seeks to induce or encourage is primary or secondary before the "object" test can be applied to the inducement itself. Otherwise, the outlawry of inducement and encouragement would ban not only all primary picketing, but all inducement of primary strikes as well.

Since it is evident that Congress cannot have intended that the language of Section 8(b)(4)(A) be applied as it reads,[22] it is pertinent to inquire why Congress did not clarify the language by inserting the word "secondary" before "strike" and before "concerted refusal." On the basis of the legislative history set forth above, it is reasonable to infer that it did not do so because it feared that, if it did, the word "secondary" might be construed, as Senator Pepper urged, pp. 25-26, *supra*, to encompass only such strike action as was considered "secondary" by those courts which applied the "unity of interest" and "community of interest" tests, pp. 26-27, *supra*. By omitting from the Section the word without which it could not rationally be given a literal application, Congress compelled resort to the legislative histor , thereby avoiding

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[22] "Section 8 (b) (4) must be interpreted and not merely read literally." *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591; *Milwaukee Plywood Company* v. *N.L.R.B.*, 7 Cir., decided Dec. 20, 1960, 47 LRRM 2291.

the risk of choice by the Board and the courts between conflicting judicial views.

This inference, and our contention that Section 8(b)(4)(A) must be read as if the word "secondary" preceded both "strike" and "concerted refusal" are both confirmed by the action which Congress took in 1959 when it amended Section 8(b)(4)(A). At the end of the revised Section, which was formerly Section 8(b)(4)(A), Congress added the following proviso:

> "*Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

The House Conference Report stated, "The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute." H. Rep. No. 1147, 86th Cong. 1st Sess., p. 38., I Leg. Hist. L.M.R. & D.A. 942. While again use of the word "secondary" was avoided, the proviso confirms that now, as from the beginning, the prohibitory language must be read as applicable only to secondary strike action and its inducement.

E. The Board's Initial Approach Correctly Conceived and Properly Applied the Primary-Secondary Distinction.

From the beginning the Board saw the problem of distinguishing between primary and secondary strike action as one of effectuating "Congress' belief that labor disputes should be confined to the business immediately involved • • • ." *United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company)*, 81 N.L.R.B.

802, 812., enforced, 10 Cir., 184 F. 2d 60, cert. den., 341 U.S. 947, see *N.L.R.B.* v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675, 681; cf. *Local 1976, Carpenters' Union* v. *N.L.R.B.*, p. 40, *supra*. Accordingly, while a union was entitled to exert full strike pressure against the primary employer, it was not entitled to direct strike pressure against a neutral employer. As the court below put in in *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591, a union is entitled "to place a boycott on [the primary employer] alone, with only an incidental economic effect on" neutral employers; it is not entitled "to place a boycott on [neutral employers] along with" the primary employer.

Moreover, the union must confine its exertion of strike pressure against the primary employer to the situs of the labor dispute, *i.e.*, to the "immediate business of [that] employer." *International Brotherhood of Teamsters Etc. (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502, 505.

The Board applied and elaborated these basic principles in a variety of early cases. Where the union applied strike pressure at a locale where the primary employer was not engaged in business, the Board had no difficulty in concluding that it had unlawfully enlarged the area of dispute. In *United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company)* 81 N.L.R.B. 802, enf'd. 10 Cir., 184 F. 2d 60, cert. den., 341 U.S. 947, the union was engaged in a labor dispute with a manufacturer of prefabricated houses. It picketed the construction site where a neutral independent contractor, who had purchased some houses from the manufacturer, was engaged in erecting them. The Board held that by picketing at the construction project, by placing the contractor on an "unfair" list, and by inducing one carpenter employed by the con-

tractor to cease work on the project the Union had engaged in secondary activity proscribed by Section 8(b)(4)(A). In *Printing Specialties and Paper Converters Union (Sealright Pacific Ltd.)*, 82 N.L.R.B. 271, the union was engaged in a dispute with a manufacturer. It picketed trucks delivering the manufacturer's goods when they stopped at the premises of his customers. Because the trucks were owned and operated by an independent transportation company, the Board found the picketing, at a place remote from the situs of the primary dispute, unlawful. In *Metal Polishers, Buffers, Platers and Helpers (Climax Machinery Company)*, 86 N.L.R.B. 1243, the union was engaged in a labor dispute with a manufacturer engaged in decorative plating. It induced employees employed by another employer at a separate plant at a different location, to refuse there to do hard-chrome plating work on goods supplied by and to be returned to the struck employer. The Board noted that this kind of job had been similarly contracted out by the primary employer before the strike, and that therefore no "ally" question was presented (see *Douds* v. *Metropolitan Federation of Architects*, S.D. N.Y., 75 F. Supp. 672). The Board held (86 N.L.R.B. at 1252) that neither the contractor-subcontractor relationship nor the fact that both employers were engaged in the "same general business" immunized the union's exertion of strike pressure at a place which was not a situs of the primary dispute.

Where the union exerted or sought to exert strike pressure at a place where the primary employer was located, and which therefore was a situs of the primary dispute, implementation of the statutory policies required that several factual situations be distinguished:

(1) Cases in which the *only* services which employees of neutral employers were called upon by their employer to

perform at the picketed premises were done for the primary employer.

(2) Cases in which *some* of the services which the employees of the neutral employer were called on to perform at the picketed premises were done for the primary employer, whereas other services were not;

(3) Cases in which *none* of the services which the employees of the neutral employer were called upon to perform at the picketed premises were done for the primary employer.

For the reasons set forth above, pp. 29-39, 44-47; *supra*, a union was entitled, as an integral part of its exertion of primary strike pressure against the offending employer, to induce employees of neutral employers, on a picket line or away from it, to refuse to perform work or render service of benefit to the offending employer at any place where the performance of such work or service involved direct contact between the neutral employees and the primary employer, *i.e.*, at his premises or at any other place where the primary employer was engaged in business.

On the other hand, the union was not entitled to induce employees of neutral employers to refrain from performing, even at a situs of the primary dispute, work or services which did not involve the primary employer. For interruption of such work or services *could not*, of itself, exert any direct economic pressure on the primary employer; it could affect him only indirectly, as a result of pressure which might be brought to bear on him by the neutral employer, whose business dealings with others than the primary employer would be disrupted by the work stoppage.

Accordingly, the Board's judgment in each case turned on whether the sympathetic strike action which a union took, or sought to induce employees of neutral employers

to take, was limited to such work or services as involved the primary employer which were to be performed at the situs of the primary dispute.

1. Cases in Which the Only Services Which Employees of Neutral Employers Perform at the Situs of Dispute Involve the Primary Employer.

Generally, in cases in this category, the primary dispute concerns a business which is located on premises owned or controlled by the primary employer. Normally, the neutral employers who come upon the premises do so for the purpose of doing business with or rendering service to the primary employer. In such cases, all the services which employees of the neutral employers perform at the situs involve or benefit the primary employer. Consequently the union is entitled to induce these employees to refuse to perform all work or service there. They are not entitled, however, even there, to induce a strike or work stoppage by these employees or others elsewhere, for that would constitute exertion of forbidden strike pressure against their neutral employer, pp. 46, 48, *supra;* cf. p. 66, *infra.*

In *United Electrical & Machine Workers (Ryan Construction Corporation)*, 85 N.L.R.B., 417, 418, Ryan, a general contractor, was engaged in constructing an addition to Bucyrus' plant. The plant was located on a 35 acre tract enclosed by a wire fence. 85 N.L.R.B. at 425. Some 500 feet from the main gate, and near the construction area, Bucyrus had installed a separate gate for the exclusive use of Ryan, his employees and suppliers. In the course of a strike against Bucyrus the union picketed all entrances to the property, including the "Ryan gate" with signs publicizing its dispute, but not identifying Bucyrus by name, 85 N.L.R.B., at 420, n. 3. Ryan's employees refused to cross the picket line and work on the construction project ceased.

The Board held (85 N.L.R.B., at 418-419) that the picketing was "in support of a labor dispute *with Bucyrus*," and the picket signs "were directed at Bucyrus, *not Ryan*." Therefore the picketing at the Ryan gate was primary, not secondary, even though "Ryan employees were the only persons regularly entering Bucyrus premises at that gate." The Board said:

> "Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers * * * When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' * * * whether 1 or 100 other employees wish to enter the premises. It follows * * * that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus*, did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate. While we agree that Section 8(b)(4)(A) represents an intent by Congress to restrict union action to the 'parties immediately involved,' as the dissent states, we do not agree that by picketing the Ryan gate the Respondents were enlarging the area of the dispute. The signs and placards carried by the pickets at the Ryan gate, which were the same as the signs carried at other gates of the Bucyrus premises, were directed at Bucyrus, *not Ryan*." [Emphasis in original.]

The emphasis in the *Ryan* case, on the fact that the picket signs were directed at Bucyrus, not Ryan, showed clearly that the Board was not sanctioning, at the primary employer's premises, inducement of a strike against a

neutral employer or any strike action away from the situs of the primary dispute.

In *Oil Workers International Union Local Union 346 (The Pure Oil Company)*, 84 N.L.R.B. 315, 318-320, a dock which belonged to, and was operated by, Standard, the primary employer, was declared to be "hot" by virtue of a labor dispute over terms and conditions of employment affecting Standard's employees who worked at the dock. Shortly before and in anticipation of picketing at the dock, Standard entered into arrangements with Pure Oil under which Pure undertook to have its employees perform at the dock, in connection with Pure products, operations which had previously been performed by Standard's striking employees. By picketing the dock, the union induced Pure's employees not to perform the loading operations. The union also by letter notified another union representing employees of the independent carrier which transported Pure's products that the dock was "hot" except when operated by Standard's foremen. As a result, the employees on the vessels refused to take on Pure's cargoes at the dock, except when they were loaded by Standard's foremen. The Board held (84 N.L.R.B., at 319), that both the picketing and the letters "must be viewed as an integral part of [the union's] lawful right to take primary action in support of its demands on Standard Oil * * * [because the response they asked of employees of neutral employers was] to refuse to perform services only *at the Standard Oil dock*" and "to respect a primary picket line *at the Employer's premises.* This is traditional primary strike action." The Board emphasized (84 N.L.R.B. 319, n. 7) that the union had not induced any refusal to handle Pure Oil's products away from the dock and had expressed no objection to the loading of those products even at the

Standard dock except by rank and file employees who would to that extent be replacing Standard's striking dock employees. It found therefore that the union had directed its strike pressure against Standard only, and not against Pure.

Similarly, in *Newspaper and Mail Deliverers' Union (Interborough News Company)*, 90 N.L.R.B. 2135, the Board found that a union, engaged in a dispute with the operator of newsstands, which approached employees of publishers at places away from the newsstands and there induced them not to deliver newspapers to the struck newsstands thereby engaged in primary, not secondary, conduct because the union's inducements "invited action *only* at the premises of the primary employer whose employees were on strike."

2. Cases in Which Employees of Neutral Employers Perform Some Services at the Situs of the Dispute Which Involve the Primary Employer, and Other Services Which Do Not.

In this class of cases, the business of the primary employer is not conducted entirely on premises he owns or controls. Instead, he conducts business, for shorter or longer periods of time, on premises of a neutral employer. The primary employer in these cases comes to the neutral's premises in order to do business with the neutral employer, *i.e.*, to render services to or receive services from him. No employees of other neutral employers come to those premises to serve the primary employer at all. But employees of the neutral employer may be called upon to perform work or services involving the primary employer while he is on the premises. To the extent that the business transactions which take place there entail the performance of such work or services, the neutral employees are subjects of lawful inducement to refrain from performing them. But insofar as

the work or services of the neutral employer's employees do not involve the primary employer, they may not lawfully be induced to refrain from performing them. The neutral employer is entitled to protection against work stoppages and their inducement insofar as work unrelated to the primary employer is involved. On the other hand, the Union is entitled to stop and to induce stoppage insofar as work related to the primary employer is involved. That is why, in such cases, as the Board put it in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 549:

> "the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved.
>
> "When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights."

This was the problem which, the Board said in its Brief to this Court in the *Denver* case, No. 393, Oct. Term, 1950, p. 26, called for "Effectuation of the dual objectives of Congress, *i.e.*, to shield neutral employers from involvement in quarrels not their own, and to preserve the right of labor organizations to bring effective economic pressure to bear upon primary employers" impelling the Board "to invoke additional criteria, supplementary to the situs test, for determining whether the primary employer or a neutral employer is the target of the particular strike action." The "roving" or "ambulatory" situs cases focused the issue.

In *International Brotherhood of Teamsters, Etc., (Schultz Refrigerated Services)*, 87 N.L.R.B. 502, the pri-

mary employer operated a fleet of trucks. The union, in a labor dispute involving the drivers, followed Schultz's trucks to the premises of his customers and consignees. When they stopped, the union picketed around the trucks with signs announcing that the drivers were replacing union members whom Schultz had locked out of their jobs. The union intended thereby to induce the employees of Schultz's customers and consignees not to "unload the trucks." 87 N.L.R.B., at 510. As soon as the trucks left the picketing stopped. Because of the "identification of [this] picketing with • • • [Schultz's] business at the *situs* of the labor dispute" (87 N.L.R.B., at 505), the Board concluded that the "picketing was directed solely at the continued functioning of Schultz's business," rather than against the business of the customers. 87 N.L.R.B., at 508. In the *Sterling Beverages* case,[23] the primary employer's roving trucks were also the situs of the dispute. The Board found that picketing at the premises of a customer, a neutral brewery, was secondary insofar as it occurred before the primary employer's trucks arrived and continued after they had left, for to that extent it induced neutral employees to engage in work stoppages at times when the premises of the brewery were not within the "area of the dispute." The Board pointed out (90 N.L.R.B., at 403) that what is "necessary to a finding of purely primary picketing" is a "direct and immediate relationship between the picketing and the object picketed," *i.e.*, the instrumentality of the primary employer's business. The picketing in this case, "unlike that in the *Schultz* case which was directed solely at Schultz trucks, was not confined to the primary Employer's *trucks*, but extended directly to the

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[23] *International Brotherhood of Teamsters, Etc. (Sterling Beverages, Inc.)*, 90 N.L.R.B. 401.

secondary employer's own premises." (Emphasis in original.)

In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, the primary employer was Samsoc, whose vessel, the Phopho, was involved in a labor dispute with the Sailors' Union. The vessel was undergoing repairs in a shipyard operated by Moore Dry Dock Company, a neutral employer. Denied permission to picket at the dock where the Phopho was moored, the union picketed the entrance to the shipyard with signs publicizing its dispute with Samsoc.

The Board held that it was entirely proper for the Union in aid of its dispute with Samsoc by such picketing and inducements away from the picket line to seek to induce employees of Moore and employees of other neutral employers who were scheduled to work on the Phopho in the Moore shipyard to refrain from doing such work. But it articulated the need, in such cases, where employees of neutral employers perform at the situs of the dispute work wholly unrelated to the primary employer, to assure that the picketing union did not deliberately invite stoppages by neutral employees more widespread than cessation of that work or services which involved the primary employer.

To that end the Board enunciated a series of rules or conditions applicable to picketing a primary employer who is doing business at the premises of a neutral employer. The Board declared (92 N.L.R.B., at 549) that such picketing would be deemed primary if:

> "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business

at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer."

If these rules were complied with, the Board would hold the picketing primary and protected. If employees of neutral employers of their own volition, either because of their reluctance in general to cross any picket line or because of their sympathy with the strikers, chose to stop work not involving the primary employer, the union could not, without unduly impairing its right to strike, be held to have "induced or encouraged" them to do so. See pp. 59-61, *infra*.

In the *Moore* case itself the Board found (92 N.L.R.B., at 549-551) that the union had met all of the conditions as laid down. It emphasized particularly that the union "was scrupulously careful to indicate" through the signs carried by its pickets and its requests to other unions for cooperation "that its dispute was solely with the primary employer, the owners of the *Phopho*," and not with Moore, the owner of the dock. Thus, "no attempt was made to interfere with other work in progress in the Moore yard;" and the appeals for cooperation invited "action only at the *situs* of dispute." 92 N.L.R.B., at 551.

3. Cases in Which Services Performed by the Employees of One or More Neutral Employers at the Situs of the Dispute Do Not Involve the Primary Employer.

In this class of cases the primary employer locates his business temporarily or permanently on premises of a neutral employer or third person either for the purpose of doing business or rendering a service to that person or for the purpose of transacting business there with other third

parties. At times, such premises are the scene of independent businesses carried on for more or less lengthy periods by many different employers; the various employers may or may not be involved, as on a construction job, in a common project. The common characteristic of these cases is that the employees of the neutral employer or employers who do business more or less permanently on the picketed premises perform no services for the primary employer. Plainly, the union was not entitled, merely because of the geographic proximity or because of any economic interest of the neutral employer in having the primary employer continue to function, to take strike action against such neutral employers or induce their employees to cease to perform any of their work, since none of it involves or is performed for the primary employer. At the same time, the union was not to be barred by the more or less fortuitous geographic nexus between independent business enterprises from exercising its right by picketing, and by other traditional methods, to seek to induce anyone and everyone, including employees of other neutral employers who come to the situs to render service to the primary employer, to boycott him by refusing to render such services to him there.

In *Montgomery Fair*,[24] the primary employer was a carpentry contractor engaged in a remodeling job at a department store, which was a neutral in the dispute between the contractor and the union. Nevertheless, the union picketed the store with signs reading "Montgomery Fair Unfair to Union Labor." The Board concluded that, being directed at a neutral employer, the picketing was secondary, not primary, even though it occurred at a place which

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[24] *Local 1796, United Brotherhood of Carpenters, Etc. (Montgomery Fair Co.)*, 82 N.L.R.B. 211.

was a situs of the dispute. See also the *Roane Anderson* case.[25]

In the *Gould & Preisner* case,[26] because the union's by-laws and rules provided that "no union man can work on a picketed job" (82 N.L.R.B., at 1210), its action in placing a picket at a construction project with a sign describing the "job" as unfair amounted not merely to "inducement" of the employees of neutral contractors on the project, but to an actual "signal in the nature of an order to the members of affiliated unions [employed by neutral employers] to leave the job and remain away until otherwise ordered." *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 678-679.

In other cases where the service of employees of neutral employers at the situs of dispute was rendered entirely to others than the primary employer, unions purported to comply with some or all of the *Moore Dry Dock* rules. However, by the conduct of the pickets, or other related conduct away from the picket line, the unions deliberately induced employees of neutral employers to refrain during the dispute from performing work or services which did not involve the primary employer at all. See *International Brotherhood of Boilermakers (Richfield Oil Corporation)*, N.L.R.B. 1191;[27] *Chauffeurs, Teamsters, Ware-*

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[25] *Local 760, International Brotherhood of Electrical Workers (Roane-Anderson Co.)*, 82 N.L.R.B. 696.

[26] *Denver Building & Construction Trades Council (Gould and Preisner)*, 82 N.L.R.B. 1195.

[27] In light of subsequent developments in Board doctrine, see pp. 77-82, *infra*, it may be noted that in this case the Board unanimously declared that the fact that Samsoe, the primary employer in the *Moore* case, had "no regular place of business which could be picketed by the Union," whereas here the primary employer did, was "not controlling" on this issue. 95 N.L.R.B. at 1193, n. 4.

housemen & Helpers (Hoosier Petroleum Company, Inc.), 106 N.L.R.B. 629, enforced 7 Cir., 212 F 2d 216.

The Board took into account the "very practical fact" that in these cases even if the union refrained from any direct inducement of neutral employees, near the picket line or away from it, employees of neutral employers who performed no services or work whatever for the primary employer, might, simply upon observing the picket line, "take action sympathetic with the strikers and * * * put pressure on their own employers" whether such a response was "intended or not, sought for or not, aimed for or not," by the pickets. *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 216, 265 F. 2d 585, 590. Consequently, the most the Board could do in such cases, without stultifying the union's right to picket the primary employer, was require the union by strict adherence to the *Moore Dry Dock* rules to make absolutely clear to the neutral employees that its dispute lay with the primary employer and not with any neutral employers, and, of course, absolutely to refrain from any direct or intended inducement of the neutral employees to cease work, near the picket line or away from it. If the union went beyond the permissible limits of *Moore Dry Dock*, directly inducing employees of neutral employers to cease work not involving the primary employer, the Board found its conduct, to that extent, secondary.

In *United Association of Journeymen, Etc. (Columbia-Southern Chemical Corporation)*, 110 N.L.R.B. 206, the union was engaged in a dispute with Westheimer, a contractor, over employment of its members on a project on Columbia-Southern's premises. Various other contractors were simultaneously engaged in performing unrelated construction work for Columbia-Southern. At the entrance

road to the premises the union placed pickets with signs advertising its dispute with Westheimer. 110 N.L.R.B. at 218. In consequence, employees of other contractors stopped work. The Board found the picketing secondary because the union had (110 N.L.R.B., at 208):

> "• • • made no effort to obtain permission from Columbia-Southern to picket inside the construction area at the actual situs of the primary dispute, Westheimer's boiler removal job—but chose, rather, to picket at a remote approach to the plant premises used by employees of secondary employers in common with the employees of Westheimer."

From the location of the picket line, and from statements made before the picketing began by union agents that if Westheimer did not yield the union would remove its men employed by other contractors on other jobs on Columbia-Southern's premises, the Board concluded that, "while the picket signs referred only to Westheimer as the target of the picketing," the fact that employees of neutral employers who were performing work not involving Westheimer refused to cross the line was a "deliberately designed" result, and not merely an "unavoidable incident of the picketing."

4. The Appropriate Function, Under the Board's Initial Approach, of a Separate Gate or Entrance to Plant Premises for the Exclusive Use of Independent Contractors.

As the foregoing discussion demonstrates, a separate or reserved gate could only serve a legitimate function in those situations where the neutral employees perform no service directly for the primary employer. For in such circumstances, since the neutral employees may not law-

fully be subjected to picket line inducement except that which is an unavoidable concomitant of primary picketing directed to those who are performing services for the primary employer, it is appropriate and proper to isolate them and thus avoid the incidental repercussions which may occur when they pass through a common gate. But where the neutrals are performing services for the primary employer it is the union's right, guaranteed to it by the statute, to enlist their aid—such appeals are of the very essence of primary activity. In such a case, the isolation of neutral employees by using a reserved gate would be merely a device by which the primary employer could thwart the union's right to engage in traditional primary activity.

Thus, while it is perfectly proper for a factory owner to establish a reserved gate for the exclusive use of outside contractors to immunize his employees in the event a union has a labor dispute with one of the contractors—since his employees perform no service for the contractor—it would subvert the intent of Congress to permit the use of that gate to immunize the contractor's employees—who are serving the factory owner—in the event that the factory owner himself becomes involved in a labor dispute. The record shows (R. 39; 66, 117, 179) that it was for the former, legitimate, purpose that General Electric initially established the separate gate at Appliance Park; it is for the latter, illicit, purpose that its use was sanctioned here.

F. In the Quartet of "Secondary Boycott" Cases Decided on June 4, 1951, This Court Found That the Board's Construction and Application of the Primary-Secondary Distinction Conformed With Congress' Dual Objectives.

It was the Board's foregoing approach to construction and application of Section 8 (b)(4)(A) which in its June 4, 1951, decisions,[28] this Court considered and held to be in "conformity with the dual congressional objectives * * *." *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 692.

It found that "While § 8 (b)(4)(A) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts" (341 U.S. at 686), Congress went no further in "shielding unoffending employers and others from pressures in controversies not their own" (341 U.S., at 692), than "draw the line at secondary boycotts." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 2 Cir., 181 F. 2d 34, 40, aff'd, 341 U.S. 694. "The substantive evil condemned by Congress in § 8 (b)(4) is the secondary boycott * * *." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 705.

In *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, the union, seeking to organize the Kaplan mill, picketed the mill with signs saying "This job is unfair * * *." 341 U.S., at 669. When two employees of the Sales and Service House, a customer of the mill, approached in a truck to obtain rice or bran for their employer, the pickets stopped the truck and told the employees that "the truck would

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[28] *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665; *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694; *Local 74, United Brotherhood of Carpenters* v. *N.L.R.B.*, 341 U.S. 707.

have to go back" (341 U.S., at 669). Later, when the employees on the truck tried to approach the mill by a short detour, "the pickets ran toward the truck and threw stones at it." 341 U.S., at 670.

1. The Holding That the Conduct of the Pickets Directed Toward the Neutral Employees Constituted Primary, Not Secondary, Action.

The Board in its decision had held (84 N.L.R.B. 360, 361), that since the activities of the pickets in relation to the Sales and Service House employees "arose out of the *primary* picketing of the Kaplan mill, and were carried out in the immediate vicinity of the mill" they were primary rather than secondary and that the violence did not transform it from primary into secondary action. The Court of Appeals for the Fifth Circuit reversed. Alone of all the courts of appeal which prior to that time had considered Section 8 (b)(4), it held (183 F. 2d 21, 26), that the Section was to be construed:

> "without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true "secondary boycott" under the old common law or under any of the modern and popular theories."

Applying the language, the court said (*ibid.*, at pp. 26-27) that the activities of the pickets:

> "became secondary when the strikers attempted to induce and encourage the employees of this neutral employer Sales House. The fact that they occurred near the struck employer's plant is not enough to

draw such a distinction as the Board attempts to draw, especially where there is violence.

. . . . . .

"To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof, simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient."

This Court reversed. As it contemporaneously stated in *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687, "we supported the Board in its conclusion that such conduct was no more than traditional and permissible in a primary strike." In *Rice Milling*, it pointed both to Sections 7 and 13 and to the legislative history as making it clear that Congress had not intended Section 8 (b)(4) to be read "to interfere with, impede or diminish the union's traditional right to strike." 341 U.S. 665, 672-673. As illuminating the content of that right, the Court cited, *inter alia*, the Board's decisions in *Ryan* and *Pure Oil*. 341 U.S., at 673, n. 6. See pp. 50-53, *supra*.

While thus rejecting the Fifth Circuit's repudiation of the Board's distinction between primary and secondary action (*Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869), this Court was careful to disavow the inference that inducement of neutral employees was necessarily primary simply because it "occurred near the struck employer's plant." It said that the fact that the inducements complained of occurred "in the geographically restricted area near the mill is significant, although not necessarily conclusive." 341 U.S., at 671. What was decisive was that there was no attempt by the union "to induce any action

by the employees of the neutral employer which would be more widespread" than refusal to cross a picket line at the primary employer's premises. 341 U.S., at 671. Thus, "The union did not engage in a strike against the customer. It did not encourage action by the customer's employees to force the customer to boycott the mill." *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-688.

Plainly, the Court implied, if the pickets had asked the employees in the truck not only to turn back, but to go on strike against Sales and Service House, or to refuse, away from the Kaplan mill, to handle Kaplan products, the Court would have found the conduct of the pickets secondary, and the fact that the inducement took place near the mill would not have provided immunity. The Court observed, however, that Section 8 (b)(4)(A) proscribes only "encouragement to some concert of action greater" than refusal of employees of a neutral employer to cross a primary picket line. 341 U.S., at 671. True, the union's signs had described "the job" rather than Kaplan as unfair and thereby left somewhat doubtful the extent of the support the union was seeking to evoke. But, the Court noted, inducements "directed * * * toward" employees of neutral employers "only as they happen to approach the picketed place of business generally are not aimed at concerted * * * conduct" any greater than refusal to cross the line. *Ibid.* Upon this finding that the conduct of the pickets was primary rather than secondary, the Court deemed it unnecessary to "determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor practice * * *." *Ibid.*

2. The Findings in *Denver* and *Langer* That the Strike Action Was Directed Against Neutral Employers.

This Court reached the question thus reserved in *Rice Milling* in the *Denver* and *Langer* cases only after finding that the strike action in those cases unlike that in *Rice Milling*, was directed against a neutral employer, not the primary employer. *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-689, and *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 697. In each case the union was engaged in a dispute with one subcontractor on a construction project over his employment of non-union labor. In each the union picketed the project with signs saying "this *job* unfair," neither identifying the contractor involved in the dispute nor limiting its dispute to him. 341 U.S., at 678, 679, 697. In its brief to this Court in the *Denver* case, No. 393, Oct. Term, 1950, pp. 37-38, the Board distinguished *Denver* and *Langer* from *Ryan*, *Pure Oil*, *Schultz* and *Moore Dry Dock* entirely on the ground that in *Denver* and *Langer* "the evidence clearly established that the picketing was directed against neutral employers * * *" whereas in the other cases the signs carried by the pickets "clearly identified the dispute as being with the primary employer only," and that the unions in *Denver* and *Langer* "exceeded the bounds of allowable primary pressure" by "failing entirely to limit their picketing to the primary employers involved."

In both cases this Court approved the Board's rationale. In the *Denver* case the union contended that it was "engaged in a primary dispute with Doose & Lintner * * * [because] they sought simply to force Doose & Lintner to make the project an all-union job." This Court replied (341 U.S., at 687-688) that "The non-union employees were employees of Gould & Preisner;" the case was there-

fore entirely different from *Rice Milling* where the Union "sought merely to obtain its own recognition" from the operator of the mill against whom it was picketing, and also entirely different from the case which would have been presented "if, for example, Doose & Lintner had been doing all the electrical work on this project through its own non-union employees." Had that been the case, said the Court, the Union's demand on Doose & Lintner would have been primary, for Doose & Lintner then "could have replaced [the nonunion men] with union men and thus disposed of the dispute." Since, however, the Union's demand on Doose & Lintner bore no relation to conditions of employment or unionization of any of Doose & Lintner's employees, the Union had no primary dispute with Doose & Lintner and the strike against Doose & Lintner was necessarily secondary.

In *Langer* the Court disposed of the contention that the picketing was directed at Langer as follows: (341 U.S., at 699-700) "* * * a labor dispute had been pending for some time between Langer and the Electricians Union but no demands were made upon [Langer] directly * * * in connection with this project. There are no findings that the picketing was aimed at Langer [the primary employer] to force him to employ union workmen on this job. On the contrary, the findings demonstrate that the picketing was directed at Deltorto's [the carpentry subcontractor's] employees to induce them to strike and thus force Deltorto, the carpentry subcontractor, to force Giorgi, the general contractor, to terminate Langer's electrical subcontract."

The principal contention of the union in the *Denver* case was that because the general contractor and his subcontractors on a construction project are engaged in a common enterprise they are not to be considered as separate em-

ployers; that if one employer on a job is "unfair" the union is entitled to treat all employers on the job as "unfair," *i.e.*, treat the "job" as unfair, and strike against all. Holding that the independent contractor relationship is not excluded from the category of "doing business," which is protected by Section 8 (b)(4) (341 U.S., at 689, 690), this Court sustained the Board's conclusion that, on construction projects as elsewhere, a union may lawfully strike only against the employer with whom it is engaged in a primary dispute.

3. Application of the "An Object" Test to Secondary Strike Action and its Inducement.

Having thus found that the strike action and inducement in both *Denver* and *Langer* were directed against neutral employers, the Court rejected (341 U.S. at 688-689, 700) the unions' further contention that, since their ultimate object was "to make the project an all union job," they could not be said to have had the forbidden statutory object of forcing the general contractor to cease doing business with the non-union subcontractor. The Court pointed out in *Denver* that the only way in which the unions could attain their admitted objective was through forcing the general contractor in each case to terminate the subcontract and that, therefore, the secondary strike "must have included among its objects that of forcing [the general contractor] to terminate that subcontract." It is "sufficient," said the Court, 341 U.S. at 700 "that *an* objective of the picketing; although *not necessarily the only*" one, was to force termination of the uncompleted subcontracts.

In the *Langer* case, 341 U.S., at 703-705, the Court also held that non-coercive, as well as coercive, inducement, when used to bring about a "secondary boycott," is within

the reach of Section 8(b)(4). Peaceful picketing and related conduct is included in the ban whenever they are used to induce or encourage "secondary pressure." 341 U.S., at 705. The Court quoted and affirmed (341 U.S., at 704) the Board's holding in *United Brotherhood of Carpenters,* the *Wadsworth* case, that, it is the:

> "*objective* of the union's *secondary* [emphasis supplied] activities * * * and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision."

Therefore, when, in *Rice Milling,* 341 U.S. at 672, this Court said that it was the "object" of the Union's encouragement that is proscribed * * * rather than the means adopted to make it felt;" and in *Denver,* 341 U.S. at 687, that "we must first determine whether the strike in this case had a proscribed object," it was obviously referring to the union's purpose to exert secondary as distinguished from primary strike pressure, and not to whether the union was seeking to bring about a cessation of business between two employers through the inducement of neutral employees.

G. *Rice Milling* is Not Distiguishable From the Case at Bar.

Particularly in view of *Langer's* holding that Section 8(b)(4)(A) outlaws all picketing which is designed to bring about exertion of secondary pressure, we think the Sixth Circuit clearly erred when, in *United Brick & Clay Workers* v. *Deena Artware,* 198 F. 2d 637, 643, cert. den. 344 U.S. 897, it disposed of *Rice Milling* on the theory that the ruling:

"was based on the fact that the evidence failed to show that the Union sought *concerted* conduct on the part of the employees of the other employer."

Since two neutral employees were involved in the *Rice Milling* case, and the inducements were directed to them simultaneously, the inducement could not have been held lawful on the theory that no "concerted" work stoppage of any kind on the part of the neutral employees was being induced, and this Court did not suggest that *no* concerted action by the neutral employees was induced. What it held was, as we have seen, pp. 65-66, *supra*, that no concerted activity of the kind "the section proscribes" was induced, a very different thing. 341 U.S., at 670. Under the approach of the *Denver* and *Langer* cases, if Kaplan's premises had not been the situs of a primary dispute, the picket line and related inducements would have been held to have induced unlawful "concerted" action even though it affected only two employees of a neutral employer and even if it reached them at different times. *N.L.R.B.* v. *Local 11, Etc.*, 6 Cir., 242 F. 2d 932, 935. By the same token, the language of *Rice Milling* may not be read to mean that a primary picket line is not to be deemed to induce prohibited "concerted" action only insofar as its inducement not to cross reaches employees of neutral employers who approach the picket line individually or sporadically, but that the same picket line may be deemed to induce prohibited "concerted" action if employees of neutral employers approach the line regularly or in groups.

Courts other than the Sixth Circuit have interpreted this Court's finding of lack of prohibited "concerted" action in *Rice Milling* as resting on the primary nature of the work stoppage induced rather than on any lack of "concert" as such. Thus, in *Local 618, etc.* v. *N.L.R.B.*, 8 Cir.,

249 F. 2d 332, 334, 336, where, as in the instant case, the picket line induced a simultaneous work stoppage on the primary employer's premises by many employees of the neutral contractor who was engaged in a long term project there, the Court found that the picketing did not differ "materially from that prevailing in the Rice Milling Company case."

In *N.L.R.B.* v. *International Union of Brewery, Etc. Workers*, 10 Cir., 272 F. 2d 817, the union picketed the trucks of the primary employer, a brewery, as they stopped to make deliveries at various retail establishments. The union also appealed orally to employees of the retailers not to accept the deliveries. The court held (272 F. 2d, at 819-820), "encouragement of retail personnel to refuse to accept deliveries" from the primary employer was neither "intended or had the effect of invoking 'concerted' action any more than in *N.L.R.B.* v. *International Rice Milling Co.* • • •."

And in *Milwaukee Plywood Company* v. *N.L.R.B.*, decided December 20, 1960, the Seventh Circuit, 47 LRRM 2291, while finding the concerted activity passage "a bit puzzling," held that, as explained in *Denver*, the basis of the *Rice Milling* decision lies in the primary character of the activity induced.[29]

Congress recently demonstrated that it did not desire the distinction between lawful primary and unlawful secondary activity to rest on whether the action which neutral employees are induced to take is "concerted." Thus, on

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[29] See also *N.L.R.B.* v. *Service Trade Chauffeurs, etc.*, 2 Cir., 191 F. 2d 65, 67; *Piezonki* v. *N.L.R.B.* 4 Cir., 219 F. 2d 879, 883; *Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D.C. 155, 162, 191 F. 2d 642, 649, cert. den., 342 U.S. 869; *Seafarers International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F. 2d 585, 591.

the one hand it amended the Act to outlaw inducement of even one employee of a neutral employer to take secondary action, and on the other, enacted the proviso, p. 46, *supra*, to assure that inducement of sympathetic primary action by neutral employees, not matter how "concerted" would not be made unlawful. See 105 Daily Cong. Rec. 15221, August 20, 1959, II Leg. Hist. L.M.R. & D.A. 1707. As illustrating the distinction between primary and secondary picketing that had become established "in existing law," and which it wished to preserve, the House Conference Report cited *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 *N.L.R.B.* 547.[30]

Thus, this case, in which nothing more was asked of the employees of the neutral contractors than that they refrain from crossing the picket line at the primary employer's premises cannot, as the court below thought, be distinguished from *Rice Milling* on the theory that it involved only "two employees" and therefore no "concerted" action.

In contrast with *Rice Milling* where the union picketed the Kaplan Mill with signs saying "This job is unfair * * *." 341 U.S., at 669, Petitioner here picketed with signs identifying General Electric as its sole adversary (R. 41; 133-134).

In both cases the picketing and other inducements were "directed beyond" the primary employer and his employees "toward the employees" of a neutral employer.

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[30] The House Conference Report citation to the *Moore Dry Dock* case is 81 N.L.R.B. 1108, which is to another Moore Dry Dock case. It is manifest from the sense of the Report that the decision which the Report had in mind is the leading Board decision with respect to the problem under consideration, reported at 92 N.L.R.B. 547. Cf. Senator, now President, Kennedy's comment in 105 Daily Cong. Rec. 16415, September 3, 1959, II Leg. Hist. L.M.R. & D.A. 1433, which gives the correct citation.

341 U.S., at 671. Just as in *Rice Milling*, 341 U.S., at 671, "[t]here was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread * * *" than refusal to cross the picket line at the mill, so in this case there was no attempt to induce any action by employees of the contractors which would be more widespread than refusal to cross the picket line at Appliance Park. Here, just as in *Rice Milling*, *ibid.*, "There were no inducements or encouragements applied elsewhere than on the picket line." The picketing aside, petitioner did not engage in a strike against any neutral employer or encourage employees of any neutral to engage in concerted action "to force [their employer] to boycott" General Electric. *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-688.

In *Rice Milling*, the fact that the neutral employees were entering the picketed premises for a purpose related to Kaplan's business established that when the union sought to enlist their support, it was doing "no more than was * * * traditional in a primary strike." Thus, when the neutral employees approached the scene of the labor dispute, they inevitably became involved in the struggle, as supporters of one side or the other. If they crossed the picket line, they would be rendering economic assistance to Kaplan despite the strike and thereby aiding him to resist the Union's demand. If they refrained from crossing, they would be supporting the Union in its effort to exert economic pressure upon Kaplan to induce him to yield. The neutral employees were "enmeshed" in the labor dispute by virtue of their presence at the Kaplan premises for the purpose of doing business with him during the dispute. The inducement of the pickets was limited to that enmeshment.

So, in this case, the presence of the contractors' em-

ployees at Appliance Park related to General Electric's business. Indeed, the continued activity of the contractors' employees was of far more significance to General Electric's business during the strike than was the single trip of the customer's employees to obtain a load of rice or bran for their employer of significance to Kaplan's mill. If it was "traditional and permissible" to induce the customer's employees in *Rice Milling* to refrain from assisting Kaplan during the strike by taking rice or bran from his mill, *a fortiori,* it was "traditional and permissible" by peacefully picketing General Electric's premises to induce the contractors' employees to refrain from continuing to work there on major projects related to the operations of the struck plant in the very buildings and work areas which were the situs of the labor dispute. (R. 26-27; Cf. R. 16). The case at bar is even stronger than *Ryan* for in that case the neutral contractor's employees were engaged entirely in new construction, whereas here they were also performing work within the struck plant. Also in that case, as indicated in the dissent, the signs did not as clearly identify the primary employer as here. 85 N.L.R.B., at 420, n. 3. Certainly, unless this Court, despite its citation of *Ryan* with approval, intended that it should make a difference that 100 rather than 2 employees of neutral employers approach the picket line, pp. 51, 65, *supra, Rice Milling* governs this case.

II. THE BOARD'S NEW APPROACH DEFEATS THE INTENTION OF CONGRESS TO PROTECT TRADITIONAL PRIMARY STRIKE ACTION.

The Board's new approach is premised upon repudiation of the view that Congress intended Section 8(b)(4) to be read as though the word "secondary" modified the words "strike" and "concerted refusal," pp. 39-46, *supra*. In contrast to the original approach, under which the test supplied by the Section's language came into play "only in the event the union's * * * activities are found to be in furtherance of a *secondary boycott*" *(International Brotherhood of Teamsters, Etc. (Schultz Refrigerated Service)*, 87 N.L.R.B. 502, 504, note 3), under the new approach, as enunciated in *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 N.L.R.B. 1844, 1845:

> "The essence of the relevant proscription embodied in the language of Section 8(b)(4)(A) of the Act is to outlaw *any* inducement of employees to cease work where an object of such conduct is to interrupt the business carried on between their company and any other company. In *simple* terms, therefore, the burden of the complaint is sustained if it is shown that (1) the picketing * * * induced [the neutral employer's] employees to cease work, and (2) an object of the inducement was to compel [the neutral employer] to cease doing business with [the primary employer]." [Emphasis added.]

By looking to the language of the Section rather than to the legislative history for the "essence of the relevant proscription" the Board lifted the restraint upon construction imposed by Congress' intention to include only second-

ary strike action and to exempt traditional primary action from the ban. And by removing tradition as a guide to the content of the concept "primary action," the Board left itself free to inject its own policy judgment as to what union action should be held permissible.

A. In the Board's New View, Lawful Primary Pressure Is Only That Exerted Through the Primary Employer's Own Employees.

The Board now declares that the only legitimate object of picketing and related activity is to induce employees of the primary employer to cease work. It acknowledges that a union is "permitted to bring pressure on the primary employer through appeals to his own employees" *(Local 657, Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981, 983). That acknowledgment is predicated on the finding that Section 13 guarantees employees the right to quit work. Thus, in *Local 618, Automotive Employees Union (Incorporated Oil Company)*, 116 N.L.R.B., 1844, 1847, set aside, 8 Cir., 249 F. 2d 332, a majority of the Board declared:

> "To the extent that picketing has as its object, and in fact induces employees of the struck employer to quit work and join their fellow workmen in concerted activity against their common employer, it is of course protected by Section 13 of the Act, which preserves the right to strike."

Consequently, the Board's view that a union can legitimately bring pressure to bear on a primary employer only through work stoppages of his own employees depends on reading Section 13 narrowly, as guaranteeing only the right

to quit work, and on disregarding completely Section 7, the proviso to Section 8(b)(4), the legislative history and the common law. As dissenting member Murdock put it (116 N.L.R.B. at 1854-1855):

> "the erroneous assumption that * * * the sole legitimate object [of primary picketing] is to induce primary employees to cease work * * * ignores elementary information as to traditional multiple purposes of primary picketing of which Congress must have been aware when it definitely protected primary picketing under the Act."

By thus restricting the economic pressure which a union can lawfully seek to bring to bear upon a primary employer to that which can be exerted through the primary employer's own employees, the Board brushed aside Congress' judgment that preservation of the right "to bring pressure to bear on offending employers" required that only *secondary* strike pressures be outlawed and *all primary* strike pressures be retained, and thereby opened to its own judgment the question which strike pressures should be tolerated. Upon this crucial supersedure of Congress' judgment with its own judgment, the Board erected its new approach.

From the assumption that the only legitimate object of picketing and related inducement is to appeal to employees and prospective employees of the primary employer it followed that (a) picketing and related inducement of employees of neutral employers is *ipso facto* illegal unless it accompanies and is incidental to an appeal to the primary employer's employees: "it is the concomitant inducement of * * * 'primary' employees that has * * * required inquiry as to the legality of picketing which, *prima facie*,

violates Section 8(b)(4)(A);" *Local 618* case, *supra*, 116 N.L.R.B. at 1847,[31] and (b) even when picketing or related inducement constitutes an appeal to the primary employer's employees, if it "also induces employees of neutral companies not to work, a question arises whether that conduct * * * runs afoul of the express prohibition of Section 8(b)(4)(A)." *Ibid.*

To resolve that question, the Board invoked the test which had been developed where picketing *directed against the primary employer* affected employees of neutral employers whose work *did not involve* the *primary employer*, namely, whether the impact of the picketing on employees of neutral employers was "inevitable and incidental," on the one hand, or intentional and avoidable on the other.[32] See pp. 57-61, *supra*. It made the shift, however, under the guise of continuing to apply the *Moore Dry Dock* tests. To do this, it read the tests as if they were predicated on its new narrow view of the legitimate scope of primary pressure. In *Local 657, Teamsters (Southwestern Motor Transport)*, 115 N.L.R.B. 981, 983, the Board said these tests were designed to "clearly establish that the picketing is directed against the *employees* of the primary employer and not the *employees* of the secondary employer," and

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[31] "* * * [P]icketing away from the situs of the primary employer's operation, where none of his employees are working, must necessarily be directed only at some other employer's employees. * * *" *Local 657 Teamsters (Southwestern Motor Transport Inc.)*, 115 N.L.R.B. 981, 983; "In the absence of conduct directly aimed at the primary employees * * * there is no question of incidental as distinguished from direct inducement." *Amalgamated Meat Cutters (Swift and Co.)*, 113 N.L.R.B. 275, 278, enf'd as mod. 237 F. 2d 20, cert. den. 352 U.S. 1015; *Local 618* case, *supra*, 116 N.L.R.B. at 1847, 1848, note 7.

[32] *Local 657, Teamsters (Southwestern Motor Transport)*, 115 N.L.R.B. 981, 983-984; *International Brotherhood of Teamsters (Ready Mixed Concrete Company)*, 116 N.L.R.B. 461, 474.

that their application "is grounded on the reasonable, although rebuttable, presumption that a labor organization [which complies with them] is seeking *to appeal only to the primary employer's employees.*" [Emphasis supplied.][33] In *Retail Fruit & Vegetable Clerks Union (Crystal Palace Market)*, 116 N.L.R.B. 856, 858 enf'd, 9 Cir., 249 F. 2d 591, it said:

> "The gist of [the Moore Dry Dock] standards is that where picketing occurs at premises which are occupied jointly by primary and secondary employers, the timing and location of the picketing and the legends on the picket signs must be tailored to reach employees of the primary employer, rather than those of neutral employers. * * *
>
> "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as *to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees*" [emphasis in original.]

Without distinguishing between employees of neutrals whose work at the common situs benefits the primary em-

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[33] From this it followed, *inter alia*, that the actual holding in *Moore Dry Dock* must have been predicated on the ground that the primary employer had no permanent place of business where the union could "picket the primary employer's employees for the purpose of putting pressure on the primary employer," and therefore in picketing at Moore's shipyard the Union was presumably seeking to appeal only to Samsoc's employees. *Local 657* case, *supra*, 115 N.L.R.B., at 983. The new majority was unembarrassed by the fact that a unanimous Board had earlier squarely held that in *Moore Dry Dock* the absence of an alternative place to picket was not a controlling factor. Note 27, *supra*.

ployer, and employees of neutrals whose work does not, these statements are, of course, untrue. And since the entire purpose of the *Moore Dry Dock* tests was to leave unions free intentionally and deliberately to induce non-performance by employees of neutral employers of work involving the primary employer at any "common situs," while outlawing inducement of non-performance only of work not involving the primary employer, the Board's failure to make that distinction rendered illegal the very primary conduct which the *Moore Dry Dock* standards had been designed to preserve.

Under the Board's new approach the test is no longer "against whom, the primary employer or a neutral employer, is the union's *boycott* directed?" Instead it is "toward whom, employees of the primary employer or employees of a neutral employer, is the union's *appeal* aimed." If that were the proper statutory test, it would necessarily apply as much to cases where the primary employer alone occupies the picketed premises as to cases where the picketed premises are occupied by the primary employer and one or more neutral employers. But, evidently because it recognized that so to apply it would result in proscribing acts of intentional inducement of employees of neutrals identical with those this Court held permissible in *Rice Milling*, the Board has exempted from application of the literal "an object" test picketing and related inducements not to cross a picket line at premises which, in the Board's view are "occupied solely by the primary employer." *Retail Fruit & Vegetable Clerks Union*, 116 N.L.R.B. 856, 860, note 10; *International Brotherhood of Teamsters (Milwaukee Plywood Company)*, 126 N.L.R.B. No. 80, affirmed, sub nom. *Milwaukee Plywood Company* v. *N.L.R.B.*, 7 Cir., No. 12,911, December 20, 1960; *International Brotherhood of Teamsters (Alexander Warehouse & Sales Co.)*, 128 N.L.R.B. No. 105.

In these cases, the Board not only does not apply the "an object" test to the picket line itself, but it treats appeals and pressures to respect the picket line deliberately and intentionally directed at employees of neutral employers, even at places remote from the picket line, as "inextricably interwoven elements of the primary picket line," and therefore permissible. *Ibid.*

On the other hand, where the union goes beyond inducements directed at honoring its primary picket line, and appeals to employees of neutral employers to refrain from handling the primary employer's goods or products at places other than the situs of the dispute, the Board applies the "an object" test *to the primary picket line itself. Local 175, Teamsters (McJunkin Corporation)*, 128 N.L.R.B. No. 57. The result is to make continuation of the primary picket line unlawful. Thus, by claiming latitude to apply or not apply the literal "an object" test, as it chooses, the Board is able to make the union's right to continue to exert pressure on the primary employer, even through primary picketing at premises occupied solely by him, dependent on the union's refraining from the exertion of any secondary pressure anywhere.

Another newly created criterion which the Board uses in deciding whether to apply the literal "an object" test to inducement directed to employees of a neutral employer not to cross a primary picket line is whether the neutral employer "is engaged in work for a relatively extended period of time" at the picketed premises. *Union de Trabajadores (Gonzales Chemical Industries)*, 128 N.L.R.B. No. 116. If so, then, in the Board's view, the premises are not occupied "solely" by the primary employer, and the Board therefore applies to the picketing the literal "an object" test, under which the union is required "to minimize its impact on neutral employers."

B. Restriction of Lawful Pressure to That Exerted Through the Primary Employer's Own Employees Severely Curtails Primary Picketing.

1. Proscription of Primary Picketing Where the Primary Employer Temporarily Removes His Employees From the Situs.

In *Local 618, Automotive Employees Union (Incorporated Oil Company)*, 116 N.L.R.B. 1844, 1847, the primary employer decided to rebuild one of his stations during the strike, and closed that station to the public until the job was completed. The union picketed with signs advertising its dispute with the owner of the station, thereby inducing employees of the construction contractor and employees of his suppliers to refuse to cross the line. The Board held that as there were no employees or prospective employees of the primary employer at the situs, the picketing could not have been intended to influence them to cease work, and as that is the only legitimate object of primary picketing, this picketing, insofar as it affected employees of neutral employers, was necessarily unlawful.

The Court of Appeals for the Eight Circuit reversed, holding that the legitimate object of primary picketing is to "publicize the union's difficulty with the employer," a purpose "much broader" than appealing to employees of the primary employer or even "discouraging replacement employees." *Local 618, Etc.* v. *N.L.R.B.*, 249 F. 2d 332, 337. It found that despite the absence of any of the primary employer's employees, the picketing was "at the business situs of the struck employer" and that even the *Moore Dry Dock* rules as originally understood were inapplicable. 249 F. 2d, at 335-336. It held (at pp. 337-338) that where "lawful picketing in support of a valid primary strike is in progress against the primary employer at the

employer's premises, the 'an object' test applied by the Board is too narrow," and observed that the Board's decision marked "a radical departure from the law as previously announced by the Board * * *" *Local 618, Etc.* v. *N.L.R.B.*, 249 F 2d, at 337.[34]

In the *Local 618* case the absence of employees of the primary employer from the picketed premises resulted from the employer's closing of the station to the public during the remodeling job. In the next case, the employer did not go even so far as to interrupt his normal business, he merely removed his non-supervisory employees temporarily from the scene. In *Seafarers International Union, Etc.* (*Salt Dome Production Company*), 119 N.L.R.B. 1638, just as in *Moore Dry Dock*, the primary employer had brought his vessel to the shipyard of a neutral employer for overhaul and repair. After the union began to picket him at the entrance to the shipyard in accordance with *Moore Dry Dock* standards, the primary employer removed all of his non-supervisory employees from the vessel. The Board found that by continuing to picket the shipyard thereafter the union violated Section 8 (b)(4)(A).

The Court of Appeals reversed, holding that the union was entitled as a matter of law to appeal to employees of neutral employers to boycott the primary employer's ship at the shipyard. *Seafarers International Union, Etc.* v. *N.L.R.B.*, D.C. Cir., 265 F 2d 585.

The Court of Appeals noted that when picketing takes place at the premises of a neutral who is only in part performing services for the primary employer, and in part doing work wholly unrelated to the primary, the neutral may not lawfully be subjected to pressures beyond those which he would feel if he came to the premises of

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[34] Cf. *Alpert* v. *United Steelworkers of America; Etc.*, D.C. Mass., 141 F. Supp. 447, 452.

the primary employer to perform his services. 265 F. 2d at 591. The only pressure which a neutral feels in consequence of an appeal to his employees not to cross the picket line at the primary employer's plant is that which results from his inability to complete the services which he is to perform for the primary employer. When the primary employer comes to the neutral's premises, however, and the neutral employer is only in part working for the primary employer, a general appeal not to cross the picket line would amount to inducement of the neutral's employees to engage in a general strike against their own employer, and not merely to stop performing services for the primary.

Thus, the court held, the question is not whether primary employees are present or absent, and not to whom the picketed premises belong, but rather whether the neutral is being subjected to pressures beyond those which are "felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed" (265 F. 2d, at 591) at his own plant and their employees are asked not to cross the picket line to make their delivery or engage in some other service for the primary employer. Finding that the union did not intend to enlarge the area of dispute beyond such appeals, the court held the picketing legal.

In addition, the court pointed out, it would be intolerable to approve the Board's rule under which "an employer can transform a picket line from a legal to an illegal one merely by moving his non-supervisory employees away." *Seafarers International Union, etc.* v. *N.L.R.B.*, D.C. Cir., 265 F. 2d 585, 590. Under the Board's approach, the court observed (*ibid.*):

> "employees [could] be held to lose the right to picket peaceably if all employees go out on strike so that

none are left on the employer's property. * * * the primary employer should not have the power to prevent picketing by merely turning out all his employees. * * * the presence or absence of employees of the primary employer on the premises is not a critical factor in the legality of a picket line."

2. Proscription of Primary Picketing at Places Where Picketing is Not "Necessary" to Enable the Union to Appeal to the Employees of the Primary Employer Who Are Involved in the Dispute.

The Board's new approach led not merely to prohibiting picketing at places where no employees of the primary employer were present, but also to its prohibition at places where, in the Board's view, picketing was not "necessary" to enable the union "adequately" to publicize its appeal to those employees who were involved in the primary dispute.

In *General Drivers, Local 968* (*Otis Massey Co.*), 109 N.L.R.B. 275, 279-280, the Board held that picketing directed against the primary employer at construction sites where he was engaged in business, and where others of his employees regularly worked, was secondary and illegal because his truck drivers and warehousemen, who were alone involved in the primary dispute, were employed at his warehouse and not at the construction sites. The union could "adequately" appeal to those employees, said the Board, at the warehouse, and it should not be permitted unnecessarily to enmesh others by picketing at the construction sites. The Fifth Circuit denied enforcement (*N.L.R.B.* v. *General Drivers, Local 968*, 225 F. 2d 205, cert. den., 350 U.S. 914), holding that the Board's rule would prevent "other employees of that same primary employer from exercising their statutory right under Section 7 * * *

to make common cause with their coworkers." The Court further held that to sanction the Board's attempt to predicate the legality of picketing at any particular situs of the dispute on a determination whether picketing there was necessary to enable the union "adequately" to publicize its dispute would mean that "under the guise of fact finding" the Board could "substitute Board inferences * * * based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of lawfulness of the end or objective sought * * *." 225 F. 2d, at 209-210.

The extent to which the Board's "own judgment as to the propriety and adequacy of the means employed in a labor dispute," is, under its new test, the touchstone for determining legality under Section 8(b)(4)(A) is reflected by its establishment of a "fifth condition" for picketing at a common situs in addition to the four *Moore Dry Dock* rules. The "fifth condition" is that the primary employer have no permanent place of business where "the union could publicize its dispute." *International Brotherhood of Teamsters (Ready Mixed Concrete Co.)*, 116 N.L.R.B. 461, 473.

The rationale of the "fifth condition" is that if the union can "adequately" appeal to employees of the primary employer at a place where only the primary employer is engaged in business, the union is not "justified" in picketing at other locations, where other employers as well as the primary employer are found. To picket at a "common situs" in such circumstances, said the Board, is to reveal that the Union's purpose is to enlist the aid of neutral employees, and thus to fail to "minimize the impact" of the dispute on neutral employers.[35]

[35] This explanation was not advanced by the Board in the first case in which it invoked the requirement, *Brewery & Beverage*

In *Local 657, Teamsters (Southwestern Motor Transport)*, 115 N.L.R.B. 981, 984, the Board said:

> "a union which can direct its inducements to the primary employer's employees at the primary employer's premises, does not seek to accomplish any more with respect to the same employees at the premises of some other employer. Consequently the only reasonable inference in such a situation is that inducements which are ostensibly directed at the primary employer's employees are in fact directed at the employees of secondary employers."

In the *Ready Mixed Concrete* case, 116 N.L.R.B. 461, 474, the Board explained:

> "Where * * * a primary employer has no fixed location * * * where its employees may adequately be reached by picketing * * * [there is] sufficient justification for permitting picketing of the primary employer at the location where the travelling work situs comes to rest, and any involvement of neutral employers and their employees may then be appropriately viewed as but a necessary incidental effect * * * But where * * * the [primary] employer has a fixed place of business * * * at which its employees can be * * *.

Drivers, Local 67 (Washington Coca Cola), 107 N.L.R.B. 299, enf'd 95 U.S. App. D.C. 117, 220 F. 2d 380. As the Second Circuit recently observed in *N.L.R.B. v. Local 294, Teamsters*, No. 53, decided Nov. 10, 1960, 47 LRRM 2085, 2088, note 3:

> "Washington Coca Cola proceeds rather on the basis of a legal conclusion, which rather clearly goes beyond the authorities, that 'After 6 years of Board and court construction of Section 8(b)(4)(A) of the Act, the fundamental principle has been established that this section proscribes picketing at the separate premises of employers who are not a party to the picketing union's primary dispute.' 107 N.L.R.B. at 302."

approached • • • the scales tip the other way. For now, the only detriment the Union would suffer by forbidding extension of its picketing to customer's job sites while deliveries are being made would be the foreclosure of what would otherwise be an added opportunity to enlist the aid of others not directly concerned with its dispute."

The "fifth condition" doctrine has been firmly rejected by the courts. *Sales Drivers, Helpers, etc., Local 859* v. *N.L.R.B.*, 97 App. D.C. 173, 229 F. 2d 514, cert. den., 351 U.S. 972; *N.L.R.B.* v. *International Union of United Brewery, Etc. Workers*, 10 Cir., 272 F. 2d 817; *N.L.R.B.* v. *International Brotherhood of Teamsters, Local 294*, 2 Cir., — F. 2d —, decided Nov. 10, 1960, 47 LRRM 2085. As Judge Friendly put it, speaking for the Second Circuit in the last cited case,

> "violation of the fifth criterion shows only that the secondary picketing had an objective other than persuading the primary employees, not that the picketing necessarily had the particular objective which § 8(b)(4)(A) forbids."

3. Proscription of Primary Picketing at a Separate Gate to the Primary Premises and at a Common Entrance Not in Current Use by Primary Employees.

Even the irrelevant excuses which the Board offered for immunizing the primary employer against picketing pressure directed against him in the foregoing cases are lacking in the "separate gate" cases, of which this was the first. In this case, unlike *Incorporated Oil*, the primary employer did not during the labor dispute close down the enterprise being picketed. General Electric continued to operate and throughout the strike contested with the union for the

sympathetic support and patronage of all persons who did business with it at Appliance Park (R. 137). Unlike *Salt Dome*, the primary employer did not remove his non-supervisory employees from the situs of the dispute; here a large number of General Electric employees in the bargaining unit affected by the strike continued to work, and General Electric was actively inducing others to return. Unlike *Otis Massey*, the union did not picket at an enterprise of the primary employer remote from the normal work area of the employees involved in the primary dispute. Unlike *Washington Coca Cola* and the other "fifth condition" cases, the Petitioner did not follow General Electric trucks from Appliance Park to, and picket at, the premises of customers to whom they were making deliveries. It restricted its picketing to General Electric's "principal place of business," unquestionably the situs of the labor dispute.

The widespread potential of the Board's new doctrine for enabling primary employers to escape a substantial portion of the economic pressure which traditionally accompanies a primary strike was revealed even more clearly by the Board decisions which followed this case. While in the instant case the record shows that the separate gate for use of contractors and their suppliers exclusively was established long before this strike, in the next case, *Local No. 36, International Chemical Workers (Virginia-Carolina Chemical Corp.)*, 126 N.L.R.B. No. 117, the Board held illegal picketing at a separate gate which was cut by the primary employer after the strike against him began.[36] In its latest decision, the Board has now held that to escape

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[36] Accord: *United Steelworkers of America (Phelps-Dodge Refining Corporation)*, 126 N.L.R.B. No. 168 (separate gate opened by primary employer few days before, and in contemplation of, potential strike against him).

some of the economic pressure of peaceful picketing directed against him at his own premises, a struck employer need not even go so far as to open a separate gate or entrance. In *Union de Trabajadores (Gonzales Chemical Industries)*, 128 N.L.R.B. No. 116, employees of a general contractor who was engaged in construction work for the struck employer entered the plant premises through the very gate or entrance that was regularly used by the employees involved in the strike. The only difference was that the contractor's employees reported for work "at different times and in groups separate" from the primary employer's employees, the former "wearing green safety helmets" and the latter "wearing white ones." The Board held that by picketing at the plant entrance at times when the contractor's employees were scheduled to enter, and by appealing to them orally to respect the picket line, the union violated Section 8(b)(4).

C. The Board's Rationale Is Untenable

1. The "Title to Property" Straw Man.

In the *Gonzales* case, *supra*, slip op. pp. 3-4, the Board attempted to justify its application of the *Moore Dry Dock* tests as refocused and redefined to picketing designed to induce employees of neutral employers not to assist the primary employer by performing work or services for him at the primary employer's own premises on the theory that to do otherwise would make "the legality of picketing * * * depend on where the title to the property was vested." But the Board's assumption is false that the reason its results differ from the results reached formerly on identical facts is that in the past, application of the *Moore Dry Dock* tests depended on "title to property." The reason different results were reached is that the substance

of the test was different. Applicability of the test depended only on whether at the picketed situs employees of neutral employers were engaged in performing work or services which, in whole or in part, did not relate to or directly and immediately benefit the primary employer. That appears not only from the cases discussed above, but from the very cases upon which the Board relies to justify its new approach.

In the case at bar the Board cited as authority *Atomic Projects & Production Workers (Associated General Contractors of America)*, 120 N.L.R.B. 400, enforced sub nom. *Office Employees International Union* v. *N.L.R.B.*, D.C. Cir. 262 F. 2d 931. (R 42, note 7) There, the primary employer, the Sandia Corporation, occupied and performed work for the Atomic Energy Commission in various buildings owned by AEC at the Sandia Base, a large tract of land in Albuquerque, New Mexico. Independent contractors were simultaneously engaged in constructing other buildings on the base under contract with AEC and the United States Corps of Army Engineers. When notified by the union of its labor dispute with Sandia and the projected picketing of the base, the Commanding Officer offered to, and did, open a separate gate to the base, not normally used, for the exclusive use of the building contractors and their suppliers during the strike. When the union picketed this separate gate, thereby inducing employees of the building contractors to cease work on the building projects they were performing for AEC and the Engineers, the Board found, and the Court of Appeals agreed, that the union had violated Section 8(b)(4)(A).

The *Associated General Contractors'* case is a classic example of the third category of "common situs" cases discussed at pp. 57-61, above, for neutral employees at the common situs were not performing *any* work or service

involving the primary employer; they were performing their work and services entirely for the AEC and the Army Engineers, and the latter were strangers to the dispute between Sandia and the Union. That any intentional or deliberate inducement of the employees of the contractors in that case to stop work was a violation of Section 8(b)(4)(A) followed *a fortiori* from this Court's *Denver* and *Langer* decisions, for here the offending employer and the neutral employer were not even engaged on the same construction project.

In *Gonzales*, the Board cited and relied on *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 N.L.R.B. 856, enforced, sub nom. *Retail Fruit & Veg. Clerks U. v. N.L.R.B.*, 9 Cir, 249 F. 2d 591. There the primary employers were Long and a number of other employers who operated independent stores or stands handling different products in a large shopping center building known as Crystal Palace Market. These primary employers, all represented by an Association for purposes of collective bargaining, were engaged in a dispute with Clerks Union No. 648. The neutral employers were a number of other employers, who operated other independent stores in the market. Some of them were not involved in the dispute because they were not represented by the Association; others were not involved because their employees were represented by another local of the Clerks Union, with whom a different employer Association, which represented these market operators, had a current contract. Long owned the market building and leased the stores to the various employers under a lease calling for Long to receive as rent a percentage of the tenants' receipts over a fixed minimum.

When the dispute arose Long gave the union permission to picket within the market in front each of the in-

dividual stands involved in the dispute. The union rejected the offer and instead picketed in front of virtually all of the entrances to the market. By this picketing and further, by direct appeals through its sister local to employees of the neutrals, it induced them to stop all work. On these facts the Court of Appeals sustained the conclusion that the neutral store and stall operators were independent entrepreneurs engaged in businesses separate and distinct from Long's, and that inducement of their employees to engage in a concerted stoppage of work "against their own employer" (249 F. 2d 591, 600), for the purpose of influencing the outcome of the union's dispute with Long and the other primary employers, was a secondary boycott.

As the Board says, the Court of Appeals in *Crystal Palace* did hold that "title to the property" is not decisive in determining whether a union involved in a labor dispute can properly seek to induce employees of neutral employers employed there to cease work. 249 F. 2d, at 596. But the decisive factor in the *Crystal Palace* case was that the services and work which the neutral employees were performing and which they were induced to stop were not being rendered to or for Long or any of the other primary employers, and consequently did not involve them directly. The fact that these employees were performing their work on premises which their employers occupied on lease from Long, no more supplied the missing nexus between their work and Long than could the fact in the *Denver* case that the employees of the neutral employers and of the primary employer were working on a common project at the same site supply the missing nexus between the work of the general contractor's employees and the primary electrical subcontractor. Similarly, the fact that under the lease arrangement operation of the neutrals' stalls during the strike would produce revenue for Long,

could no more justify disregard of the neutrals' status as independent entrepreneurs than could the economic interrelationship between contractor and subcontractor justify in *Denver* and *Langer* treating separate employers as if they were one and the same. Consequently, just as in *Denver*, the union was not entitled by picketing or otherwise to call or induce a strike of employees of the general contractor or subcontractors who were not performing work or services for the primary employer, so in *Crystal Palace*, the unions were not entitled by picketing or otherwise to call a strike of employees of the neutral stall operators.

In enforcing the Board's decision in *Crystal Palace*, the Court of Appeals did not adopt the Board's rationale and it specifically disapproved the majority's repudiation of *Ryan*. 249 F. 2d at 596 and note 8.[37]

In *Gonzales* the Board also cited *Local Union No. 55, and Carpenters' District Council (Professional and Business Men's Life Insurance Company)*, 108 N.L.R.B. 363, enf'd. sub nom. *N.L.R.B.* v *Local Union No. 55*, 10 Cir., 218 F. 2d 226. In that case, employees of neutral subcontractors were engaged, at premises owned by the Life Insurance Company, the primary employer, in work on a building for that company. In addition, the insurance

[37] While the court correctly described the *Moore Dry Dock* standards as "evidentiary tests to aid in determining whether common-situs picketing is primary and lawful or secondary and unlawful" (249 F. 2d, at 596-597), this formulation is not complete for, as originally conceived, the standards marked the boundaries within which a union was entitled to exercise its statutory right to picket the primary employer at a common situs, and thereby reflected the degree to which, in the balancing process, the Board had diminished "the right of * * * the union to picket" in deference to the right of secondary employers, to the extent they were not serving the primary employer at the situs, "to be free from picketing." *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549.

company acted as its own general contractor on the job. The key to the court's finding of violation, however, lies in the nature of the action which the union took against the subcontractors. Thus, it did not limit the scope of its inducement of the subcontractors' employees to work on that project, or to work involving the insurance company; it induced employees of the subcontractors to strike against the subcontractors *generally, everywhere,* for the purpose of forcing the subcontractors to cease doing business with the insurance company, a violation equivalent to that which would have existed if the pickets in *Rice Milling* had sought to provoke a strike against Sales and Service House, pp. 65-66, *supra.*

Thus, the court found (218 F. 2d, at 228) that the unions representing the subcontractors' employees "had long been disturbed by the fact that union members had been working on projects of the insurance company along with nonunion men." The union "took steps to correct such practice by exerting pressure" on the "subcontractors." It did this by threatening the subcontractors that their union member employees would be fined and expelled from the union, and *"the rest of* [their] *employees would be taken away"* if the subcontractors "continued to work [their] men on nonunion projects" [emphasis supplied]. Thereafter, the union placed the insurance company on an "unfair list" and picketed its construction job with signs reading "Working Conditions on this Job Unfair to Carpenters' District Council."

The court found (218 F. 2d, at 231), that since "the picketing signs were not directed at the primary employer alone, but * * * at the project, at which secondary employers were also working," and in view of "the pressure that had theretofore been directed at the secondary employers," it was reasonable to conclude that the picketing

was designed "to create pressures that would cause the subcontractors to stop work on their subcontracts." If this is read as meaning "pressures against the subcontractors more widespread than those flowing from refusal of their employees to work on the Insurance Company job," it is consistent with the holding of this Court in *Rice Milling*, and the decision by no means supports the Board's position. If it is construed, however, as meaning that the union is not entitled to picket the project with signs advertising its dispute with the insurance company or otherwise induce employees of the contractors not to work on the Company's project, it is incompatible not only with *Rice Milling* but with the implications of *Denver* and *Langer* as well.

The Board has also relied upon *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 6 Cir., 198 F. 2d 637, cert. den. 344 U.S. 897, which, in its decision in the *Crystal Palace* case, *supra*, 116 N.L.R.B. at 859, the Board characterized as holding that "the fact that picketing was limited to a construction site owned by the primary employer [did not preclude] as a matter of law, a finding that the picketing violated Section 8(b)(4)(A)."[38]

While of course, as we have seen, title to property is not controlling, the fact that the construction work in *Deena* was being performed *for the primary employer* at his premises should have precluded a finding that the picketing was directed "against the general contractors" rather than "against Deena" in the absence of independent evidence of more widespread inducements. In its own Section 8(b)(4)(A) decision, on the same facts, the Board, citing *Pure Oil*, held that since "the record contains no evidence of secondary picketing," the picketing of Deena at its

[38] In fact that case arose not under Section 8 (b)(4) but under Section 303.

premises was primary "as a matter of law." *Deena Artware, Inc*, 86 N.L.R.B. 732, 735, enforced, sub nom. *N.L.R.B.* v. *Deena Artware*, 6 Cir., 198 F 2d 645, 653, cert. den., 345 U.S. 906.[39]

2. Distinction in Terms of the Duration of the Neutral Employer's Presence at the Situs Is Without Justification.

The Board's attempt to determine the legality or illegality of intentional inducement of the employees of the neutral employer to refrain from performing work directly involving and benefiting the primary employer, on the basis of the duration of the neutral employer's presence at the situs of the labor dispute is wholly without justification. The Board's opinion in *Gonzales* suggests that it constitutes an attempt to capitalize on the "happen to approach" phrase wrenched out from context from this Court's opinion in *Rice Milling*. See pp. 66, 70-73, *supra*.

If we attribute to this distinction the function of immunizing against the economic consequences of primary strike pressure those neutral employers who are most seriously affected but not neutral employers less substantially affected, the distinction is not only lacking in statutory foundation, but is also wide of the mark. The distributor of a single product who cannot obtain deliveries of the product because his employees will not cross a picket line at the manufacturer's plant may suffer injury more severe

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[39] In *N.L.R.B.* v. *Associated Musicians*, 2 Cir., 226 F. 2d 900, cert. den., 351 U.S. 962, where the court held that the right to conduct a primary strike had not been "inordinately infringed by the prohibition * * *" of picketing at the Stadium and Rink from which a few of the primary employer's employees sometimes broadcast, *none* of the employees of the neutral employers at the Stadium or Rink performed any work or service for the primary employer. In addition, the court found that "neither the Stadium nor the Rink was at any time the situs of the dispute between the union and Gotham." 226 F. 2d at 905.

than contractors whose employees will not cross a picket line to work on the struck employer's premises. The contractor can usually bid and work on other jobs more easily than the distributor can switch his product line.

From the point of view of the primary employer, likewise, the continuation during the strike of his long term projects cannot rationally be distinguished from continuation of his shipments and deliveries by employers with whom he is engaged in business regularly and continuously. Employees of such employers, like employees of the contractors, come to his premises regularly and predictably over long periods. The only difference is the duration of their stay each time. What rational or economic difference does that make? What would the Board say to the case of a machine repairman, called in to perform work requiring a whole day, two days, a week? Could the primary employer insulate such employees from picketing by having them pass through a separate gate? Where could the line be drawn, and why?

From the point of view of the unions the duration of the neutral employees' stay is equally irrelevant. Their interest, and their right, under the law is to disrupt by peaceful picketing and comparable publicity all of the primary employer's business relationships at the struck plant. Neither the nature of the business which the neutral employers are doing with the primary employer, nor its extent, nor its duration, is relevant in determining, from their point of view, whether it is of benefit to the struck employer and therefore an appropriate target of primary strike pressure. To remove permanent or long standing business relationships from the reach of such pressure is simply, *pro tanto*, to diminish the union's power to exert pressure on the primary employer in support of their demands, and thereby impair the right to strike.

D. The Board Has Usurped the Function of Congress.

The Board says that it merely seeks "to accommodate" in "a reasonable and practicable manner in common situs cases" the "dual congressional objectives * * *." *Gonzales* case, slip op. p. 3. It claims that under its new approach, "without unnecessarily enmeshing neutral employers in the disputes of others, the union is left free under *Moore Dry Dock* criteria effectively to exert its pressure on the employer with whom it is in dispute."

But the interests which the Board is now undertaking to weigh and reconcile are not those which Congress left for it to balance. Cf. *N.L.R.B.* v. *Truck Drivers Local Union, No. 449*, 353 U.S. 87, 96. What the Board initially did, and what this Court approved as being consistent with Congress' policy, was to refine the application in common situs cases of the policy of protecting neutral employers against secondary strike pressures; it did not seek to immunize them against the impact of primary strike action which is incidental to and stems from the neutral's business enmeshment with the primary employer at the scene of the dispute. The Board's approach acknowledged that because Congress precluded only "a union's resort to the secondary boycott" (*N.L.R.B. v. Drivers Local Union* 639, 362 U.S. 274, 283), the claim of "bystanders to be free of harm" cannot be a claim to be free of all harm but only of harm from "so-called 'secondary boycotts * * *.'" *N.L.R.B.* v. *Service Trade Chauffeurs, Etc.* 2 Cir., 191 F.2d 65, 67. Therefore "a union may lawfully inflict harm on a neutral employer, without violating § 8(b)(4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business." *Ibid.* "Congress did not intend to forbid picketing" directed solely against the primary employer, whether at a primary employer's premises, or at the prem-

ises of a neutral where those premises are "the situs of the dispute * * * [n]o matter how great the pressure on a neutral employer may be * * *." *Seafarers' International Union, Etc.* v. *N.L.R.B.*, 105 U.S. App. D.C. 211, 217, 265 F.2d 585, 591. "Mere incidental effect on the secondary employer is not enough to constitute a secondary boycott." *N.L.R.B.* v. *Local Union No. 55*, 10 Cir., 218 F.2d 226, 230. "* * * [P]eaceful picketing [even] upon common premises, directed solely against the primary employer with whom a labor dispute exists, is * * * lawful under the Act, and * * * any adverse effect upon secondary neutral employers must necessarily be viewed as incidental to the lawful exercise of that statutory right." *N.L.R.B.* v. *General Drivers, Etc.*, 5 Cir., 225 F.2d 205, 210, cert. denied, 350 U.S. 914.

Under the Board's new approach, however, it draws a line of demarcation between what it considers effective strike pressure on the one hand, and the interest of neutrals in avoiding all repercussions of strike action on the other. This reverses Congress' judgments that (a) the consequences of primary strike action must necessarily be endured, and (b) neutral employers should be protected against the impact of secondary, not primary, pressure. There is not a scintilla of suggestion that Congress authorized the Board to inquire, as it does under its new test, how much primary activity is adequate in order that a union may "effectively * * * exert * * *pressures on the employer with whom it is in dispute?" "Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure that the question has been asked." *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 499-500. To ask that question is not only to misapply *Moore Dry Dock* rules, it is to usurp Congress' province to decide

where, in the area of economic conflict, the line between the permissible and the unlawful should be drawn. What masquerades as an attempt to effectuate Congress' dual objectives is actually an essay in effectuation by the Board of a new economic policy of its own.

Here, as in *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363, to sustain the Board's position would be to permit the Board under the "guise of administration to put limitations in the statute not placed there by Congress." It is as true in this case as in that one that "the Board's policy * * * would make an unfair labor practice out of that which is authorized by the Act * * *" and thereby defeat Congress' policy. *Ibid.* Just as Congress did not allow the Board, under the "guise of determining good or bad faith in negotiations" to "regulate what economic weapons a party might summon to its aid" (*N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 490, so did it not allow the Board, under the guise of distinguishing between primary and secondary boycotts, to outlaw primary picketing because it thinks its pressure on neutrals is too severe, or "unnecessary." The Board cannot by proscribing economic weapons "minimize the pressure on the other party," or introduce "some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons * * *" *Ibid.* The statute does not contain "a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." (*Ibid.*) Just as the Board was not allowed, under the guise of administration, to "sit in judgment upon and to condemn" picketing for recognition by a minority union because it disapproved of the economic pressures so generated (*N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. 274, 282), so must it not be allowed to sit in judgment upon

and to condemn primary picketing where it disapproves of its economic consequences.

As in *N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. at 291 where this Court observed that the Board's initial decisions on the question there at issue "gave a sounder construction to Section 8(b)(1)(A) than the Board's construction in the present case," so did the Board's decision in *Ryan* give a sounder construction to Section 8(b)(4)(A) than does its decision here. In the *Local 639* case the Board may have felt itself at liberty to reverse its field, for its prior decisions had not been approved by this Court as reflecting a sound approach to the statute. But in view of this Court's citations of *Ryan*, *Pure Oil* and *Schultz* with approval, pp. 21, 65, 75, *supra*, the same cannot be said for it here. In this area, the Board has undertaken not only to reverse its own prior decisions, but the views of this Court as well.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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